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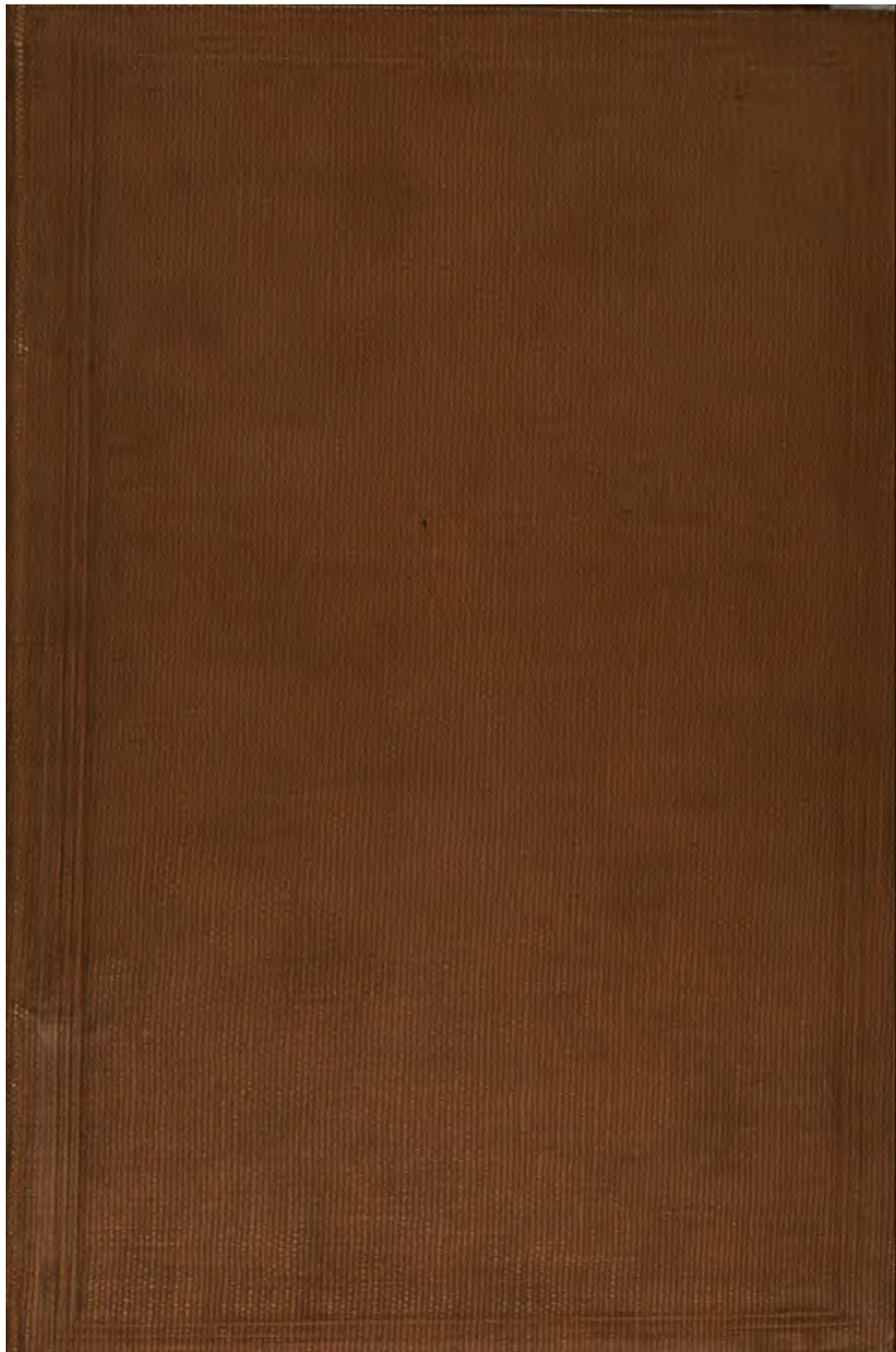
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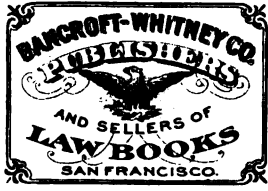
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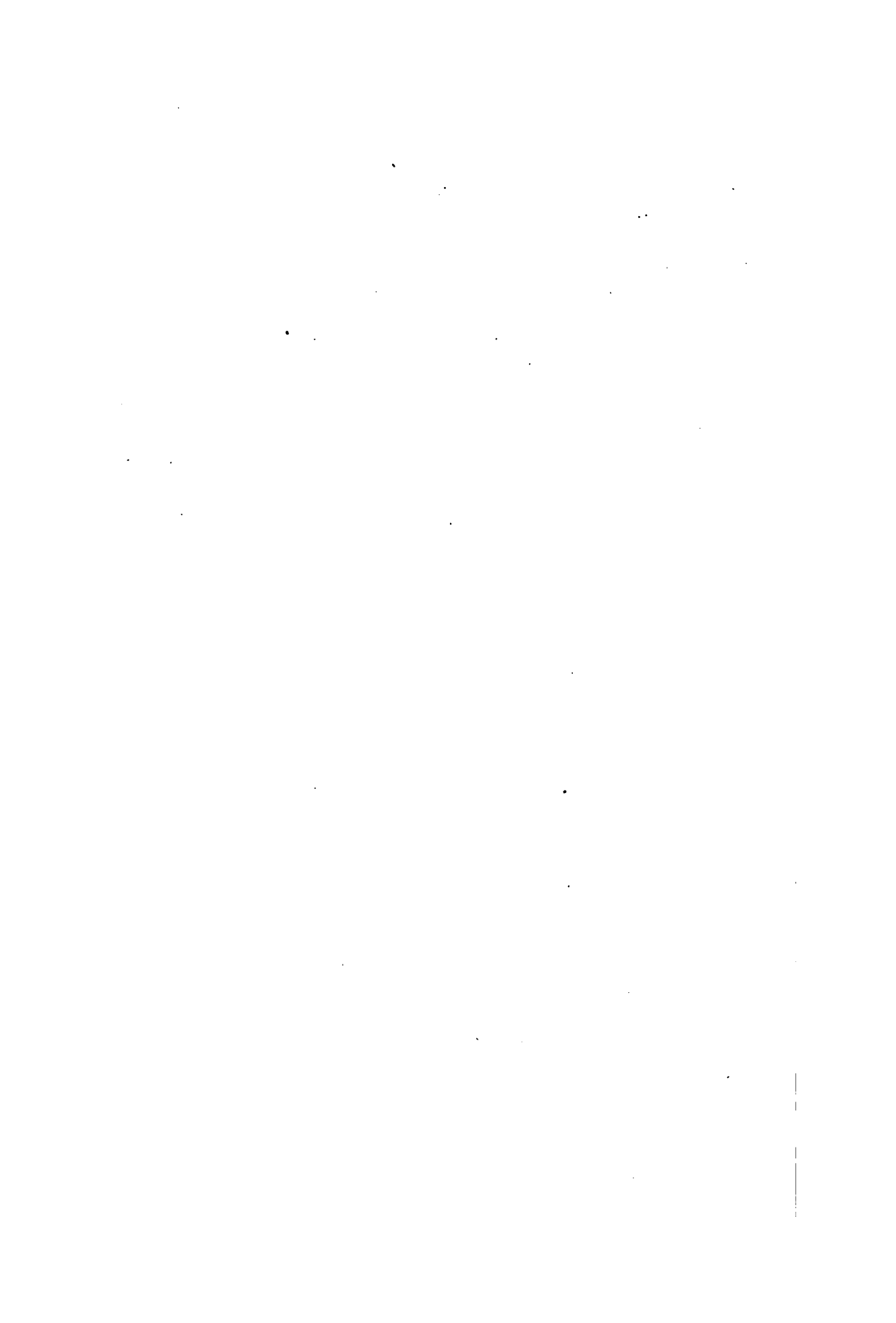
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THE LAW RELATING
TO
OIL AND GAS

INCLUDING

Oil and Gas Leases and Contracts, Production of Oil and Gas, both Natural
and Artificial, and Supplying Heat and Light thereby, whether
by Private Corporations or Municipalities

BY
W. W. THORNTON

Author of Gifts and Advancements, Lost Wills, Railroad Fences and
Private Crossings, etc.

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OIL AND GAS

PREFACE.

The production of petroleum in this country annually amounts to millions of barrels, and in value to millions of dollars. It is one of the greatest industries of this country. The value of natural gas annually flowing from the earth is of almost inestimable value. Since petroleum and natural gas became commercial products, thousands of cases concerning their production, sale and transfer, involving new and unusual questions, have been decided in our courts, many of which have been reported in official and unofficial publications. These "new and unusual questions" have, at times, sorely tried the courts to determine and settle the rights of the contending parties according to legal principles and in accordance with justice. Cases have come before the courts involving many questions of so unique a character that no precedents could be found. Necessarily, there has grown up quite a body of law, unknown to the past generations. To collate and discuss the many cases involving questions concerning petroleum and natural gas, and the rights and liabilities involved in their production, sale and transportation, has been one of the objects of the author in the preparation of this volume.

The subject of oil contracts has also been discussed at length.

Much prominence has been given to the subject of oil and gas leases,— by which is meant leases of lands for the purpose of developing them to secure petroleum and natural gas,— and questions growing out of that subject. Early in the preparation the author perceived the impossibility to reconcile all the cases upon this subject, and to harmonize them in a satisfactory manner. What he has attempted to do has been to state the questions decided, at times giving his own views for whatever

they may be worth. He has cited many cases, where he thought them applicable, upon the subject of mining of solid minerals, — coal mining cases,— believing that those using this work would find such cases of value and aid them in their practice. In this he has gone far beyond the line adopted by writers upon the subject of oil and gas. Especial care has been taken to secure citations of all cases upon this subject.

The work is not confined merely to the subject of petroleum and natural gas, and their production. The production and supplying of artificial gas has been treated at length,— much more so, it is believed, than can be found elsewhere either in this country or England. The duty of a gas company to furnish gas to the consumer, its liability for failure to furnish him gas, and its liability to him for neglect whereby he or others are injured by leaking or exploding gas has been treated at considerable length.

Particular attention has been given to the powers of municipalities to light their streets, to furnish gas to their inhabitants, and their relations to gas companies, and the right of these companies to use streets and highways for the laying of their pipes or mains therein. It is believed that nowhere else has the subject of exclusive or monopolistic grants,— the right to occupy the streets, to the exclusion of all other competitors,— been treated as exhaustively as in the present work.

The right of a municipality or a legislature to regulate gas companies and to control their rates to customers has received particular attention.

Upon these subjects electric lighting and street railway cases have been frequently cited, as well upon the subject of the right of electric and street railway companies using the streets of a city.

A chapter has been devoted to the subject of insurance in connection with use and storage of oil and gas in the building insured.

The aim has been to not only make this volume a useful and convenient work for the practitioner having an oil or gas lease or contract under consideration, but also for attorneys of

municipalities and artificial and natural gas companies who are investigating the rights and duties arising between municipalities and gas companies, as well as the rights and duties of gas companies to the inhabitants of such cities and to their patrons or customers.

Forms of oil and natural gas leases and contracts used in Pennsylvania, West Virginia, Ohio, Indiana, Kansas and Texas have been inserted in the Appendix, which it is believed will be found to be useful.

W. W. THORNTON.

Indianapolis, Ind.

January 1, 1904.

CONTENTS.

CHAPTER I.

HISTORICAL SKETCH.

SEC.	PAGE.
1. Petroleum known to ancients.....	1
2. Early discoveries of petroleum in United States	3
3. Early account of a western New York oil spring.....	5
4. Washington county, Ohio, oil well.....	8
5. The first oil well in United States.....	9
6. Other first oil wells in United States.....	12
7. In what countries petroleum found.....	13
8. Natural gas was known to ancients.....	15
9. Early natural gas in America.....	16
10. Sources and composition of petroleum and gas.....	18
11. Composition of petroleum.....	21
12. Composition of natural gas.....	
13. Early attempts at distilling or refining petroleum.....	24
14. Early use of petroleum as a medicine	25
15. Transportation	26
16. The first oil lease.....	28
17. Early use of artificial illuminating gas.....	29

CHAPTER II.

LEGAL STATUS OF OIL AND NATURAL GAS.

18. Oil and natural gas a mineral.....	31
19. Part of realty.....	32
20. Ownership in earth.....	33
21. Compared with animals <i>feræ naturæ</i>	33
22. When title vests in owner.....	34
23. Ownership of oil differs from that of water.....	35
24. Owner of land has only a qualified ownership.....	37
25. Qualified ownership in oil—power of legislature.....	39
26. Severance of oil or gas from realty.....	42
27. Recovery of severed product— <i>Trover</i>	43
28. Wasting gas—injunction	44
29. Increasing flow of gas by pumping well.....	45
30. Pumping oil wells.....	47
31. Exploding nitroglycerin in well to increase flow.....	47
32. Maliciously boring well to injure another.....	48

SEC.	PAGE.
33. Measure of damages for unlawfully taking oil and gas from the soil	48
34. When lessee acquires title to oil.....	49
35. Waste,—part of realty.....	50
36. Partition	51
37. Oil and gas not synonymous.....	52
38. "Other valuable volatile substances".....	52
39. Natural gas not heat.....	52
40. Gas and oil an article of commerce.....	52
41. Judicial notice.....	53
42. Judicial knowledge of oil and gas properties.....	54
43. Plugging wells.....	54
44. Not subject to tariff law of 1890.....	55
45. Entry of government oil lands.....	55
46. Property in oil tanks or pipe-lines.....	55

CHAPTER III.

OIL AND GAS LEASES.

47. Peculiarity	60
48. Name applied to instrument does not determine its legal effect..	62
49. Lex loci governs.....	62
50. License and incorporeal hereditaments.....	62
51. Interest of lessee is a chattel real.....	63
52. Contract giving interest in real estate.....	64
53. Estate does not vest if oil or gas not found.....	67
54. Vesting title subject to condition precedent.—Diligence.....	69
55. Tenancy from year to year or at will.....	70
56. Unilateral Contract.....	71
57. Legal interest of lessee in various leases—digest.....	72
58. Sale of oil and gas, and not a lease.....	76
59. Presumption as to ownership of oil or gas is ground.....	77
60. Administrator's right to lease or contract—presumption.....	78
61. Lease and not a license.....	79
62. License	82
63. License — consideration — revocation.....	82
64. License, revocation.....	82
65. Merger	83
66. Consideration	84
67. Option to purchase after development.....	86
68. Option to extend lease.....	87
69. Acceptance of second lease by lessee in first lease.....	87
70. Extension of time of lease may amount to a new lease.....	88
71. Options—revocation.....	88
72. Options continued.....	91
73. Option to pay rent or drill well.....	93
74. Appurtenances, what will pass as such.....	93
75. Statute of frauds.....	94

SEC.	PAGE.
76. Description of leased premises.....	95
77. Right of lessor to use surface.....	96
78. Construction	98
79. Construction of instrument by parties.....	99
80. Unfilled blanks.—Written and printed clauses.....	100
81. Execution of lease.....	100
82. Defective execution or acknowledgment.....	100
83. Parol change of written lease.....	101
84. Acceptance—estoppel	101
85. Lessee need not sign lease—deed.....	102
86. Separate owners giving joint lease.....	102
87. Notice to one of several lessees.....	103
88. Second lease,—notice.....	103
89. Agent of lessee may take lease after forfeiture.....	104
90. Exclusive right of licensee of lessee.—Solid mineral oil.....	105
91. Implied covenant.....	107
92. Covenant running with land.....	108
93. Personal covenants.....	109
94. Assignment of contract giving interest in land,—incorporeal hereditament—lease—surrender	110
95. Lessee liable after assignment on express covenants.....	112
96. When work must be begun.....	113
97. Diligence in operating leased premises after development.....	113
98. Agreement as to what constitutes due diligence.....	114
99. Unprofitable lease.....	114
100. Lessor cannot impair value of lease by drilling wells on his own land	115
101. Lessee draining premises by operations on adjoining territory....	117
102. Drilling well near boundary line.....	118
103. Injunction—quieting title.....	119
104. Damages	121
105. Damages for failure to keep covenant.....	122
106. Damages for neglect to develop or operate leased premises....	123
107. Damages for neglect to operate—res judicata.....	124
108. Damages for taking oil or gas.....	124
109. Boundaries.—Location of wells.....	125
110. Selection of site.....	126
111. Number of wells.....	127
112. Number of wells.—Protecting lines.....	128
113. Test wells.—Excuse for not drilling.....	130
114. Test well, when need not be drilled.....	132
115. Test well,—depth.....	134
116. Lessor and lessee by mistake locating well on stranger's land....	135
117. "Shooting" well.....	135
118. Oil lease, who entitled to gas.....	136
119. Oil lease gives no right to gas if oil be not found.....	139
120. Eviction—ejectment	140
121. Failure of title, reimbursement of operator.....	141

SEC.	PAGE.
122. Lessee denying tenancy.....	142
123. Uncertainty on lease.—Unconscionable.....	142
124. Diameter of wells.....	143
125. Contract to drill wells "in the vicinity.".....	143

CHAPTER IV.

DURATION OF LEASE.

126. Ordinary leases.....	144
127. Diligent search.—Implied covenant.....	145
128. Holding for speculation purposes.....	145
129. Non-development of leased premises where no limit fixed.—Forfeiture	146
130. Greater diligence required in developing oil than coal lands.....	148
131. Acquiescence in delay—unavoidable accident.....	150
132. Acquiescence in abandonment—damages.....	150
133. Actual mining operations must be commenced.....	150
134. In paying quantities.....	151
135. Paying quantities, continued.....	135
136. Gas in paying quantities.....	157
137. Abandonment	160
138. Lessee may abandon non-productive premises.....	162
139. Completion of non-productive well—title.....	163
140. Instances of abandonment.....	163
141. Cessure of work after operations begun.....	166
142. Surrender	168
143. Surrender by substitution of tenants or assignment of lease.....	169
144. Parol surrender.....	172
145. Payment of rental instead of developing premises.....	172
146. Rescission for fraud.....	174

CHAPTER V.

FORFEITURE OF LEASE.

147. Forfeiture not a favorite of the law.....	176
148. Rule in gas or oil leases.....	176
149. History of change in rule giving lessor exclusive right to declare a forfeiture.....	179
150. Forfeiture favored by equity when it will promote justice.....	182
151. Lessor only can declare forfeiture.....	182
152. Heirs or assignees of lessor may declare forfeiture,—assignee.....	185
153. Stranger cannot avail himself of forfeiture.....	186
154. Lease may be voidable at election of lessee on his default, surrender	186
155. Lessee cannot insist on forfeiture to escape rent.....	188
156. Forfeiture clause omitted.....	189
157. Implied covenants do not authorize forfeiture.....	189
158. Notice of election to declare forfeiture.....	190

CONTENTS.

xi

SEC.	PAGE.
159. Waiver of forfeiture.....	191
160. Waiver of forfeiture by accepting payment.....	194
161. Eviction of lessee.....	196
162. Failure to operate and not for failure to develop.....	197
163. Continuance of operation.....	197
164. Production of gas will not prevent forfeiture of an oil lease....	198
165. Covenant uncertain.....	199
166. Re-entry	199
167. Release of premises equivalent to a re-entry.....	200
168. Surrender after assignment—forfeiture.....	202
169. Forfeiture of only part of lease.....	202
170. Partial development—abandonment.....	205
171. Lessee draining leased premises by wells on adjoining territory...	206
172. Lessee draining away oil by sinking wells on adjoining premises..	207
173. Inability to complete work.....	207
174. Mortgage of leasehold may work a forfeiture.....	209
175. When work must be completed.....	209
176. Excavating for oil means bringing it to the surface.....	210
177. Failure to pay royalty or report them.....	210
178. Payment of rent will not prevent forfeiture for neglect to develop.	211
179. Must pay rent although no oil on premises.....	212
180. Lessee must pay past rents.—Damages.....	213
181. Lessor consenting to abandonment.....	213
182. Estoppel of lessor.....	214
183. Demand for compliance with lease.....	215
184. Abandonment a question of intention.....	215
185. Forfeiture a question for jury.....	215
186. Suit to cancel lease for non-development of territory.....	217
187. Relief from forfeiture.....	218
188. Time to avoid forfeiture.....	219
189. Lessee cannot recover premises after forfeiture.....	220
190. Reimbursement for expenses.....	220
191. Removal of fixtures and machinery.....	221
192. Damages instead of declaring a forfeiture.....	222

CHAPTER VI.

ASSIGNMENT AND SUBLETTING OF LEASE.

193. Lessor — lessee.....	223
194. Interest assignee secures.....	224
195. Assignee cannot take advantage of default in lease.....	224
196. Refusing consent to assignment.....	224
197. Sublease.—Division	225
198. Assignment carries option.....	225
199. Transfer of lease by judicial sale.....	226
200. Equitable assignee in possession.....	227
201. Lease unassignable.....	227
202. Assignment of royalties.....	228

SEC.	PAGE.
203. Assignee of lessee bound by agreements in lease.—Privity of estate	231
204. Ground of assignee's liability to lessor.....	232
205. Assignee's liability broadened by terms of assignment or by out-side contract.....	234
206. Extent of assignee's liability.....	235
207. Liability of assignee of a part interest in lease.....	237
208. Liability of occupier under unassigned lease.....	238
209. Assignee not taking possession liable.....	238
210. Several successive assignees.....	239
211. Lease not executed by lessee, but possession taken under the lease, effect	239
212. Lessee released by substitution of assignee.....	240
213. Trustee of lessee and not his cestuis que trustent liable.....	242
214. Cestuis que trustent may be liable.....	243
215. Liability of assignee to his assignor.....	243
216. Assignor liable on account of lease as a surety.....	245
217. Sublease—liability of sublessee.....	246

CHAPTER VII.

RENTS AND ROYALTIES.

218. Limitations of chapter.....	249
219. Construction of leases.....	249
220. Various methods of fixing rents or royalties.....	250
221. A royalty is rent—"mining rent.".....	250
222. Definition of rent and rent charges.....	251
223. Payment so much per well.....	252
224. Royalty, percentage of profits or income.....	253
225. Payment of operating expenses first.—Free gas.....	254
226. Free gas.....	255
227. Royalty in gas or oil used to operate leased premises.....	257
228. When royalty due,—removal of oil from premises.....	258
229. When rent is due for failure to develop land.....	259
230. To whom payable—joint lessors.....	259
231. Damages for failure to deliver lessor his share.....	261
232. Interest on royalties.....	261
233. Waiver—parol evidence.....	261
234. Surrender—tract "retained.".....	261
235. Interdependent conditions.....	262
236. New lease	262
237. Termination of lease by failure to keep its terms.....	263
238. Lessee cannot avoid payment by taking advantage of forfeiture clause	264
239. Forfeiture clauses and liability for rent.....	265
240. Surrender of lease necessary to escape liability for rent.....	267
241. Eviction	268
242. Rent to be paid if well not drilled.....	268

CONTENTS.

xiii

SEC.	PAGE.
243. Minimum production allowed.....	271
244. Consideration for lease may be purchase money.....	272
245. Consideration for grant part of minerals, creates an exception...	273
246. One well draining two tracts of land.....	273
247. Oral change of lease discharging or changing rents.....	274
248. Failure of oil, royalty ceases.....	274
249. Rent for exhausted well,—flooded well.....	275
250. Instances of lessee's liability.....	275
251. Account rendered.....	277
252. How collected.....	277
253. Lien of royalty accruing during receivership.....	278
254. Assignment of lease does not carry oil in tank on premises.....	278

CHAPTER VIII.

WHO MAY MAKE A LEASE.

255. Owner of land may grant.....	279
256. Infants.—Lunatics.....	279
257. Married women.....	280
258. Wife joining husband in lease—homestead.....	284

CHAPTER IX.

TENANTS FOR YEARS.

259. May work open mines.....	285
260. When may open new mines.....	285

CHAPTER X.

TENANCIES FOR LIFE.—DOWER.

261. May work mines or oil wells already open.....	287
262. Rule concerning life tenants applies to oil leases.....	288
263. May not open new mines or bore new wells.....	289
264. Curtesy estate of husband.....	289
265. When mines may be opened or wells bored.....	290
266. Mineral lands unfit for any other purposes than mining.....	291
267. Reversioner or remainderman opening wells.....	292
268. Life-tenant must account for waste.....	292
269. Title to mineral or oil severed.....	293
270. Destruction of corpus of the estate.....	293
271. Oil or gas may be exhausted.....	293
272. Estoppel of remainderman.....	294
273. Assignment of dower in mines.....	294

CHAPTER XI.

CO-TENANTS.

SEC.	PAGE.
274. One co-tenant may operate land of co-tenancy for oil or gas.....	296
275. Lease of license granted by co-tenant.....	297
276. Partition of mines or mineral lands.....	297
277. Partition of oil or gas lands.....	299
278. Accounting between co-tenants.....	300
279. Accounting when tenant excludes co-tenant.....	305
280. Owner of surface not co-tenant with owner of mineral beneath surface	306
281. Purchase by tenant of co-tenant's interest.....	306
282. Equity jurisdiction of an accounting.....	306
283. Expense of working joint property.....	307
284. When a tenant bound by co-tenant's act.....	308
285. Injunction	308
286. Surrender of lease by co-tenant.....	308
287. Payment of rent or royalties.....	309
288. Fidelity relation between members of a mining partnership.....	309

CHAPTER XII.

CONTRACTS FOR A LEASE.

289. Not often drawn into controversies.....	313
290. Indefiniteness	313
291. What is a sufficient writing.....	314
292. Effect of taking possession under contract.....	317
293. Specific performance of contract for lease.....	318
294. Damages for breach of contract to give lease.....	320

CHAPTER XIII.

ADVERSE POSSESSION — STATUTE OF LIMITATIONS.

295. Peculiarities of oil and gas — possession of surface.....	321
296. Rule as to oil and gas.....	322
297. Possession of surface not adverse to owner of oil or gas.....	323
298. Possession of oil operator not adverse to owner of surface.....	325
299. Acquiring right to oil or gas under statute of limitation.....	325
300. Receiver — title in dispute — injunction.....	326
301. Accounting	327

CHAPTER XIV.

RESERVATION AND EXCEPTION.

302. Distinction between reservation and exception.....	328
303. Severance of mineral by reservation or exception.....	329

CONTENTS.

XV

SEC.	PAGE.
304. Reservation of "all minerals" includes oil and gas.....	329
305. Reservation of right to drill for oil restricted.....	332
306. Ownership of gas or oil beneath public highways, rivers or sea...	332
307. Reservation or exception subject to lien of judgment.....	334
308. Wife's interest in reservation—construction.....	334
309. Location of oil claim on public lands.....	335

CHAPTER XV.

PARTNERSHIPS.

310. Mining partnerships applicable to gas and oil operations.....	336
311. Tenants in common not partners.....	337
312. By agreement a mining association becoming an ordinary partner- ship	338
313. Mining agreements that create ordinary partnerships.....	339
314. Working a mine together creates a mining partnership.....	340
315. Selection of a partner.—Sale of interest.....	341
316. Tenants in common usually do not become partners.....	342
317. Illustration of what makes a mining partnership.....	343
318. Promoters — Prospectors.....	345
319. Life of mining partnership — dissolution.....	346
320. Partition and accounting works a dissolution.....	347
321. Majority control.....	347
322. Power of partner in mining or oil enterprise.....	347
323. Partner's lien.....	350
324. Liability of incoming partner.....	350
325. Each partner liable for all partnership debts.....	351
326. Limited partnerships.....	351

CHAPTER XVI.

MECHANICS' LIENS.

327. Lubricating oil.....	353
328. Labor or material must be furnished under a contract.....	353
329. For what material furnished a lien may be obtained.....	354
330. For what labor a lien may be obtained.....	356
331. Overseer, custodian or superintendent entitled to a lien.....	357
332. Upon what interest in land lien may be acquired.....	359
333. Lien on oil well.....	359
334. Forfeiture of lease.....	360
335. Retroactive effect.....	361
336. Priority of liens.....	361
337. Notice of claim of lien — description of land.....	362
338. Assignment of claims.....	363
339. On plant of public gas company.....	363
340. Oil refinery — paraffine works.....	364

CHAPTER XVII.

MORTGAGES.

ART.

1. Mortgage of oil or mining property.
2. Mortgage of gas plant.

ARTICLE 1.

MORTGAGE OF OIL OR MINING PROPERTY.

SEC.	PAGE.
341. Leasehold may be mortgaged by lessee.....	365
342. Lessor may mortgage premises.....	366
343. Mortgage of oil or mining lease in Pennsylvania.....	368
344. Mortgagor may remove gas, oil and minerals.....	370
345. Mortgagor in possession.....	370
346. Mortgagee in possession.....	371
347. Mortgagee in possession, English rule.....	373

ARTICLE 2.

GAS PLANT.

348. Gas plant.....	380
---------------------	-----

CHAPTER XVIII.

TRANSPORTATION AND EMINENT DOMAIN.

349. Scope of chapter.....	382
350. Transportation of gas or oil a public use.....	382
351. Carriers of oil — tank cars.....	384
352. Transportation from state cannot be prevented.....	384
353. Transportation by pipe-line.— Inter-state commerce.....	385
354. Regulation of transportation.....	386
355. Ownership of oil in pipe-lines.....	388
356. May be endowed with powers of eminent domain.....	388
357. Artificial gas companies.....	389
358. Foreign companies excluded from use of power of eminent domain.....	390
359. Number of lines that can be laid in right of way acquired.....	391
360. Laying pipes in country highway.....	391
361. Measure of damages, for taking right of way.....	391
362. Damages occasioned by gas company's trespass on land.....	393
363. Prospective damages for fires and explosions.....	393
364. Removal of pipe line, damages.....	394
365. Pipe line crossing right of way of railroad company.....	394
366. Revocation of license.....	395
367. Route, specifying in petition — more than one route.....	395
368. Coal mine beneath pipe line — support.....	395
369. Well pipe passing through coal mine.....	397

CHAPTER XIX.

TRANSPORTATION OF OIL AND GAS.

SEC.	PAGE.
370. Limit of discussion.....	398
371. Injuries occasioned in transporting oil by reason of defective cars or track.....	398
372. Defective oil tank — car — remote liability — intervening agency. Crude petroleum not a dangerous agency.....	372
373. Oil shipped on trains carrying other goods.....	404
374. Shippers liability to servant of carrier.— Naphtha — petroleum — dangerous agency.....	404
375. Injury to passengers—Train wreck.....	405
376. Curiosity seekers.— Exploding oil.....	407
377. Allowing oil to escape from pipe line.....	408
378. Inspection of pipe line.....	408
379. Oil illegally stored at railroad station.....	409
380. Storing oil in warehouse.....	409
381. Thief setting oil on fire.....	410

CHAPTER XX.

LEGISLATIVE AND MUNICIPAL CONTROL.

382. Gas a dangerous agency — police powers.....	411
383. Regulating pressure in pipes.....	412
384. Prohibiting transportation of gas beyond the state.....	415
385. Plugging abandoned wells — waste of gas.....	415
386. Preventing waste of gas — Flambeau lights.....	417
387. Waste of gas in operating oil well.....	418
388. Inspection of oil — tests.....	418
389. Ordinance regulating storage of oil.....	419
390. Regulating sale of naphtha by United States.....	419
391. A charter is a contract.....	419
392. City cannot fix rates without statutory authority.....	421
393. Municipality regulating rates after ordinances granted.....	421
394. Rates fixed in ordinance granting franchise.....	422
395. Rates fixed by city in its consent to assignment of franchise right.....	424
396. Gas company accepting provisions of subsequent ordinance.....	424
397. Prohibition to change for specified time.....	425
398. Police power.— Rates.....	426
399. Municipality regulating gas companies.....	426
400. Power to change rates — rates established must be reasonable....	427
401. Gas companies quasi public corporations — rates may be changed.....	431
402. Same continued.....	436
403. Same continued — rates may be changed.....	439
404. Municipality delegating power to change rates.....	442

SEC.	PAGE.
405. Annexing territory after contract made.....	443
406. Police power regulations.....	444

CHAPTER XXI.

CONTRACTS FOR MUNICIPAL LIGHTING.

407. Power to make contract.....	445
408. Constitutional or statutory limitations on indebtedness.....	447
409. Length of term of contract.....	451
410. Extending term of contract.....	454
411. Bids for lighting.....	455
412. How contract executed.....	456
413. Liability of city for breach of contract — damages.....	457
414. Assignment of lighting contract.....	459
415. Rescission of contract — breach.....	460
416. Discontinuing use of gas.....	461
417. Changing contract.....	462
418. Gas furnished not covered by contract.— No contract.....	462
419. Municipality extending limits after making contract.....	463
420. Municipality receiving light under a void contract.....	464
421. Contracts void for uncertainty.....	465
422. Moonlight schedule.....	465
423. The price to be paid.....	466
424. Free light.....	466
425. Exemption from taxation in fixing price of gas.....	468
426. Cost of light, out of what fund paid.....	468
427. Appropriation for light, when necessary to validity of contract...	468
428. Exhaustion of appropriation as a defence.....	469
429. Tax to pay for gas or to support gas plant.....	469
430. Assigning cost of public lighting upon abutting property — Cost of municipal plant.....	470
431. Mandamus to compel auditing or payment of bills.....	471
432. Action to recover for gas supplied.....	471
433. Interest.....	472
434. Lamps — posts.....	472
435. United States revenue tax.....	473
436. Waiver as to quality of gas or light.....	474
437. Extending mains, failure to pay for light.....	474
438. Receiver bound by contract.....	474
439. Municipal officer interested in contract.....	475

CHAPTER XXII.

MONOPOLISTIC GRANTS AND CONTRACTS.

440. Division of subject.....	477
441. Legislature may authorize monopolistic grants.....	478
442. Same continued.— Pennsylvania.....	481

SEC.	PAGE.
443. Same continued.....	484
444. Statute authorizing exclusive grant.....	485
445. A grant to use of streets to exclusion of all others must rest on statutory power.....	486
446. Grant of exclusive franchise strictly construed.....	489
447. Legislature cannot revoke monopolistic clause of company's charter	493
448. Municipality agreeing not to compete with gas company.....	495
449. Legislature may not authorize monopolistic grants.....	498
450. Estoppel to contest validity of monopolistic grant ratification....	498
451. A federal question.....	499
452. Monopolistic clause does not avoid whole contract.....	500
453. Enjoining passage of ordinance.....	500
454. Forfeiture of exclusive franchise.....	500
455. Exclusive franchise for artificial gas does not exclude natural gas.	501
456. Extension of time for completion of work. Additional require- ments	501
457. Gas works built under void grant or franchise.....	502
458. Municipality's right to purchase existing works is optional....	502
459. Unlawful combinations between gas companies.....	503
460. Granting privilege to use streets does not require a general ordi- nance — general ordinance regulating streets.....	503
461. Contracts for light, length of term.....	505
462. Dating contract ahead.....	509

CHAPTER XXIII.

STREETS AND HIGHWAYS.

463. Definitions — street a highway.....	512
464. Control of streets or highways.....	512
465. Use for private purposes.....	513
466. Consent of municipality to occupy streets necessary.....	514
467. Right to a franchise not property of municipality.....	516
468. When consent of municipality not necessary.....	516
469. Nature of a grant to occupy streets or highways.— A mere privi- lege	518
470. Nature of grant to occupy streets or highways.—A franchise....	521
471. Acceptance of grant.....	522
472. Gas company must comply with conditions of grant.....	523
473. Grant to occupy streets construed strictly.....	524
474. What streets company may occupy.— Sidewalk.....	525
475. Territory annexed to another municipality after grant made....	525
476. New streets, right to occupy.— No streets specified.....	526
477. Sale or assignment of right in streets.....	527
478. Change of use of franchise.— Natural gas.....	528
479. Ordinance void.— Estoppel.....	530
480. Gas company occupying streets is subject to municipal regula- tions	531

SEC.	PAGE.
481. Injunction to protest company's rights in streets.....	534
482. Grant before company is organized.....	534
483. Length of grant of franchise.....	534
484. Termination of life of corporation before expiration of franchise..	535
485. Consolidation of gas companies.....	535
486. Town becoming a city.....	536
487. Injunction to restrain laying of pipes in streets.....	537
488. Pipe laid in street unlawfully laid out.....	537
489. Revocation of grant.....	538
490. Forfeiture of right to occupy streets for failure to perform duty..	539
491. Action to declare forfeiture.— Quo warrants.....	539
492. Waiver of right to declare forfeiture.....	541
493. Changing grade of street.....	541
494. Tearing up streets.— Obstruction.— Indictment.....	542
495. Cutting into modern pavements.— Repairs.— Permission.....	543
496. Injury to pipes in repairing streets.....	545
497. Support of gas mains.....	546
498. Gas boxes in street.....	547
499. Leaving gasposts in street.....	547
500. Pipes in streets not an additional burden.....	548
501. Pipes laid in navigable river.....	548
502. Grant right to use suburban highway.— Compensation to abutting landowner.....	549
503. Condemnation of landowner's interest in highway.....	550
504. Landowner acquiescing in occupation of rural highway.— Injunc- tion.— Estoppel.....	550
505. Pipe lines in country highway an additional burden on easement.	552
506. Consent of county — public highways, crossing.....	553
507. Revocation of license to use highway.....	554
508. Abutting landowner removing pipe lines.....	554
509. Company may not remove pipes unlawfully laid in rural high- way.....	554
510. Pipes on surface of highway or street.....	555

CHAPTER XXIV.

MUNICIPALITY SUPPLYING GAS.

511. Municipality may be authorized to own gas plant.....	557
512. Sufficiency of statute to authorize municipality to furnish gas for commercial purposes.....	559
513. Insufficiency of statute to authorize a municipality to furnish commercial gas.....	562
514. Construction of municipal charters.....	563
515. Municipality's profit.....	564
516. Competition with private plant.....	565
517. Election to authorize purchase or erection of plant.....	565
518. Municipality must be sole proprietor of plant.— Taking stock..	567
519. Right to purchase plant of gas company.....	568

SEC.	PAGE.
520. Trustees for gas works.....	569
521. Sale of municipal plant.....	571
522. Municipality may lease its own gas works.....	572
523. Rules and regulations.....	573

CHAPTER XXV.

THE GAS COMPANY AND CONSUMER.

524. No requirement at common law.....	574
525. Company must supply gas.....	576
526. No discriminations.....	578
527. Failure of supply of natural gas.— Discrimination.....	580
528. Supply only to abutting property owners.....	581
529. Extension of mains or pipes.....	582
530. Inspection of premises.....	583
531. Mandamus to compel supply.....	584
532. Mandamus to compel furnishing of gas.....	586
533. Penalties for failure to supply gas.— Damages.....	586
534. Damages for failure to supply gas.— Sickness.....	589
535. Limiting liability for failure to supply gas.....	591
536. Application for gas.....	592
537. Rules and regulations.....	594
538. Subscribing to rules and regulations.....	595
539. Price to be charged.....	596
540. Payment in advance.....	600
541. Deposits.....	601
542. Discrimination in use.— Rates.....	602
543. Classification of customers.— Rates.....	603
544. Recovering back overcharges.....	604
545. Collection of rents.— Action.....	605
546. Collection of rents by distress.....	606
547. Shutting off gas for failure to pay.....	607
548. Injunction to prevent cutting off gas supply.— Rates.....	612
549. Consumer's right to discontinue use of gas.....	613
550. Ownership of supply pipe.....	315

CHAPTER XXVI.

METERS AND MIXERS.

551. Definitions.....	617
552. Who must furnish.....	617
553. Control of meter.....	619
554. Unreasonable requirements.....	621
555. Inspection of meters by company.....	621
556. Official inspection and tests.....	622
557. Officially tested meters conclusive.....	622
558. Measurements of quantity of gas used.....	623

SEC.	PAGE.
559. Delivery of gas.....	624
560. Rules and regulations concerning.....	624
561. Extra charge for meters and mixers.— Government tax.....	625
562. Requiring use of a certain quantity of gas per month or pay a meter rent.....	626
563. Discrimination in use of meter.....	626
564. Removal of meters.....	627

CHAPTER XXVII.

FIXTURES.

ART.		
1.	Domestic fixtures.	
2.	Trade fixtures.	
3.	Oil and gas lease fixtures.	
565.	Division of subject.....	628

ARTICLE 1.

DOMESTIC FIXTURES.

566.	Intent — common law — public policy.....	628
567.	Agreement — innocent purchaser — injury to freehold.....	630
568.	Gas chandeliers — stoves — meters, etc.....	631
569.	Judicial sale of premises.....	633
570.	Gas fixtures may pass to vendee.....	633

ARTICLE 2.

TRADE FIXTURES.

571.	Between mortgagor and mortgagee.....	636
572.	Gas pipes in houses.....	636
573.	Landlord and tenant.....	637
574.	When tenant must remove.....	633

ARTICLE 3.

OIL AND GAS LEASE FIXTURES,

575.	Coal and mineral leases.....	640
576.	Oil and gas lease fixtures.....	642
577.	Conveyance or mortgage of fixtures.....	644
578.	Special contract controls.....	647
579.	Gas and oil pipe lines.....	648

CHAPTER XXVIII.

NUISANCES.

580.	Scope of chapter.....	650
581.	Pollution of well or spring by artificial gas.....	650

CONTENTS.

xxiii

SEC.	PAGE.
582. Pollution of running streams.....	653
583. Pollution of subterranean waters.....	658
584. Damages occasioned by storing or bringing oil on land.....	661
585. Gases destroying trees and vegetation.....	662
586. Noisome smells.....	663
587. Odors from operation of oil wells and works.....	665
588. Other disagreeable odors in neighborhood.....	666
589. Degree of annoyance.— Question for jury.....	667
590. Gas or oil well near house or building.....	668
591. Business authorized by government no defence.....	671
592. Duty of owner to prevent continuance of damages.....	672
593. Evidence	673
594. Injunction	673
595. Enjoining erection of gas plant.....	675
596. Former recovery a bar.....	675
597. Indictment for nuisance.....	676
598. Waste of natural gas or oil.....	676

CHAPTER XXIX.

LEAKS AND EXPLOSIONS.

599. Duty of gas companies in general.....	680
600. Care required of gas companies.....	681
601. Gas company must keep its gas constantly under control.....	682
602. Degree of care required of gas company.....	685
603. Night watchman.....	687
604. Gas company's act or neglect must have caused the damage....	688
605. Two or more defendants liable.....	691
606. Statute permitting recovery although there is no negligence....	694
607. Explosion occasioned by a violation of a statute.....	695
608. Laying gas main in navigable river.....	695
609. Overwhelming disaster.....	696
610. Burden of proof.....	697
611. Presumption of negligence does not arise from proof of explosion.	698
612. Presumption of negligence arising from proof of explosion.....	702
613. Stop-cock on street line.....	703
614. Intervening agency.....	704
615. Inspection of pipes or mains.....	705
616. Duty to make repairs immediately.— Available force.....	709
617. Notice of leaks.....	710
618. Notice—failure to discover place of leak.....	712
619. Notice of leak, when not necessary to fix liability.....	713
620. Evidence of notice to gas company of danger to mains.....	713
621. Evidence of other leaks.....	714
622. Evidence of leaks.....	715
623. Breaks occasioned by ordinary use of streets.....	716
624. Action of frost.....	716
625. Pipes breaking from lack of support.— Excavations near pipe line.	717

SEC.	PAGE.
626. Property owner's duty to notify gas company of leaks.....	719
627. Company misleading plaintiff as to extent of danger.....	721
628. Municipality operating plant.....	721
629. Gas following supply pipe from main — percolating through soil.	
— Sewer	722
630. Withdrawing gas from mains without notice.....	723
631. Undue pressure in mains.....	724
632. Evidence of undue pressure at other places.....	725
633. Explosion caused by act of servant of gas company.....	727
634. Company undertaking to repair consumer's pipes or fixtures.....	728
635. Injury to shade trees — shrubbery.....	729
636. Illuminating gas driving sewer gas into house.....	730
637. Explosion caused by act of third person.....	730
638. Gas fitter igniting escaping gas.....	733
639. Negligence of fellow servant.....	735
640. Person on premises by license.....	736
641. Guest or inmate of family may recover from gas company where owner is negligent.....	737
642. Lessee's right of action against the gas company.....	737
643. Third person causing gas to escape, liability.....	737
644. Gas turned on by owner or stranger.....	738
645. Landlord's right of action against tenant.....	740
646. Tenant's right of action against landlord.....	740
647. Owner of premises liable to injured person.....	741
648. Plaintiff must show due care on his part.— Contributory negli- gence	742
649. Owner removing from his premises.....	743
650. Duty of property owner to cut off supply of gas.....	744
651. Searching for leaks with a light.....	745
652. Contributory negligence a question for the jury.....	749
653. Negligence of parent, wife or servant.....	750
654. Contributory negligence of tenant may bar landlord,— reversion- ary interest.....	752
655. Negligence of contractors.— Lessee.....	753
656. Right of action over.....	755
657. Liability of gasfitter.....	755
658. Evidence to show due care on gas company's part.....	755
659. Expert evidence to show effect on electrolysis.....	757
660. Evidence in cases of inhalation of gas.....	757
661. Expert evidence on inhalation of gas.....	759
662. Proof of effect upon growing vegetation or grass.....	760
663. What acts of negligence a question for the jury.....	761

CHAPTER XXX.

INJURIES NEGLIGENTLY CAUSED BY OIL AND GAS.

664. Scope of chapter.....	769
665. Fire on railroad communicating to refinery.....	770

CONTENTS.

XXV

SEC.	PAGE.
666. Neglect in not providing stop-cock.— Injury to servant.....	770
667. Injuries from shooting wells.....	775
668. Oil escaping into sewers.....	776
669. Injury occasioned by exploding gasoline fire-pot.....	777
670. Use of false brands.— Explosion.....	778
671. Negligent care of grounds.— Fire communicating to adjoining houses	778
672. Oil escaping from and exploding refinery.....	779
673. Rescuer injured by negligence of an oil or gas company.....	780
674. Minor employee's oil-soaked clothes catching fire.....	781
675. Explosion of benzine used in paint.....	781
676. Servant of oil company injured by defective appliances.....	782
677. Injuries to servant of purchaser — sale in violation of statute....	783
678. Sale of oil of low fire test, explosion.— Deception.....	785
679. Implied warranty in sale of illuminating oil.....	786
680. Gas box in sidewalk.....	787
681. Negligence of contractor.....	787
682. Streets rendered dangerous by laying gas mains.....	788
683. Imperfectly constructed gas building.....	789
684. Exploding tank injuring servant.....	790
685. Servant entitled to safe place in which to work.....	791
686. Servant injured by use of defective ladder.....	792

CHAPTER XXXI.

INSURANCE.

687. Extent of discussion.....	795
688. Conflict between rider or written part and printed part of policy	795
689. "On the premises".....	795
690. "Contiguous" to insured building.....	797
691. Oil for illumination.....	798
692. Time of filling lamps.....	798
693. Failure to extinguish lamps.....	799
694. The oil prohibited.....	799
695. Prohibited user not occasioning loss.....	801
696. Owner himself must violate terms of policy — tenant.....	802
697. Explosions — no clause of exemption.....	802
698. Explosions of oil or gas.....	804
699. Failure to disclose use of oil.....	806
700. Warranty — hazard not increased.....	806
701. Particular use allowed.....	807
702. Extent of prohibited usage.....	807
703. Occasional use of hazardous articles.....	807
704. Increase of risk.....	808
705. Proof of custom or the usual practice.....	809
706. Implied consent to prohibited use.— Custom.....	810

SEC.	PAGE.
707. "Storing"—"keeping"	811
708. Store	814
709. Grocery	815
710. Watchmaker	816
711. Furniture store—wagonshop.....	816
712. Factory	817
713. Drug store	817
714. Laundry	818
715. Patent leather factory.....	818
716. Painter—paintshop or factory.....	819
717. Torch to remove paint from house.....	819
718. Cleaning clothes.—Destroying vermin.....	821
719. Cleaning or lubricating machinery.....	821
720. Waiver by knowledge of acquiescence in use of building.....	821
721. Waiver by knowledge of acquiescence in use of building continued.....	823
722. Waiver by receiving premium with knowledge of prohibited user.....	825
723. Waiver by adjusting loss or accepting proof without objection.....	825
724. Insurance company's right of action to recover damages. Effect of insurance on right of action.....	826
725. Gas company causing fire liable to insurance company.....	827
726. Inhaling gas, accident or life insurance policy.....	828

CHAPTER XXXII.

TAXATION.

727. Scope of chapter.....	831
728. When corporate stock taxed property of company exempt.....	831
729. Exempt as a manufacturing company.....	832
730. Gas mains of city plant taxed as personal property.....	832
731. Assessing franchise.....	834
732. Valuation of stock—certificates as to surplus.....	834
733. Exemption of municipalities from taxation.....	835
734. Rates charged consumers not taxes.....	835
735. Cost of inspection of meters.....	835
736. Object of tax—Ohio statute unconstitutional.....	836
737. United States revenue.....	836
738. Set off.....	837
739. Product in pipe line. Interstate commerce.....	837
740. Exemption from taxation.....	838
741. Taxes on leases and minerals.....	839

CHAPTER XXXIII.

MISCELLANEOUS.

742. Artificial gas statutes do not relate to natural gas.....	842
743. Larceny of gas.....	842
744. "Shut off gas," meaning.....	843

CONTENTS.

xxvii

SEC.	PAGE.
745. Contract for purchase of oil.....	844
746. Term "fire proof oil" as a trademark.....	844
747. Gas company's liability for supplies.....	844
748. Gas not a necessary of life.....	845

APPENDIX.

Forms of gas and oil leases and agreements.....	846
-------------------------------------------------	-----

INDEX.

Index	874
-------------	-----



TABLE OF CASES.

(References are to pages.)

- A**
- Abendroth v. Greenwich** (29 Conn. 247; 29 Conn. 356), 563
- Acheson v. Stevenson** (146 Pa. St. 299; 23 Atl. Rep. 331, 336), 33
- Ackley v. Phoenix Ins. Co.** (25 Mont. 272; 64 Pac. Rep. 665), 811, 812, 818
- Acklin v. Waltermier** (10 Ohio C. C. Dec. 629; 19 Ohio C. C. Rep. 372), 226, 359, 360
- Acmé Coal Co. v. Stroud** (5 Leck. Leg. News (Pa.) 169), 218
- Acton, *Ex parte*** (4 L. T. (N. S.) 261), 633
- Adair v. Southern, etc., Ins. Co.** (107 Ga. 297; 33 S. E. Rep. 78), 802
- Adams v. Briggs Iron Co.** (7 Cush. 361), 77, 299
- Adams v. Harrington** (114 Ind. 66; 14 N. E. Rep. 603), 512
- Adams v. Ore Knob, etc., Co.** (7 Fed. Rep. 634), 76, 192, 199
- Adams v. Stage** (18 Pa. Super. Ct. Rep. 308), 107, 114, 115, 275
- Adams Express Co. v. Cincinnati Gaslight & Coke Co.** (10 Ohio Dec. 389; 21 Wkly. L. Bull. 18), 586, 607, 627
- Aderhold v. Oil Well Supply Co.** (158 Pa. St. 401; 28 Atl. Rep. 22), 64, 112, 224, 226, 232, 234, 236, 267, 269
- Adrian W. W. v. Adrian** (64 Mich. 584; 31 N. W. Rep. 529), 453
- Ætna Ins. Co. v. Boon** (95 U. S. 117), 803
- Ætna Ins. Co. v. Humboldt, etc., Ny. Co.** (3 Dill. 2), 827
- African Territories v. Wallington** ([1898] A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545), 315
- Agarter v. Vandergrift** (138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 202), 183, 193
- Agna Pura Co. v. Las Vegas** (10 N. M. 6; 60 Pac. Rep. 208; 50 L. R. A. 224), 428-440
- Ahrns v. Chartiers Valley Gas Co.** (188 Pa. St. 249; 41 Atl. Rep. 739), 101, 127, 132, 189, 278, 327
- Akin v. Marshall Oil Co.** (41 Atl. Rep. 748; 188 Pa. St. 614; 188 Pa. St. 602), 109, 201, 225, 234, 245, 247, 254, 258, 307, 327
- Akron Water Works Co. v. Brownless** (1 Ohio Dec. 1; 10 Ohio C. C. 620), 461
- Albert v. Davis** (49 Neb. 579; 68 N. W. Rep. 945), 618
- Alden's Appeal** (93 Pa. St. 182), 329
- Alderson v. Alderson** (46 W. Va. 242; 33 S. E. Rep. 228), 290
- Alexander v. Ellison** (79 Ky. 148), 308
- Alexandria, etc., Co. v. Irish** (16 Ind. App. 534; 44 N. E. Rep. 680), 53
- Alexandria, etc., Co. v. Painter** (1 Ind. App. 587; 28 N. E. Rep. 113), 725

(References are to pages.)

- Alexandria Mining, etc., Co. v. Irish (16 Ind. App. 534; 44 N. E. Rep. 680), 695-698-705, 713, 714, 723, 725
- Algonquin Coal Co. v. Northern, etc., Co. (162 Pa. St. 114; 28 Atl. Rep. 402), 63
- Allegheny v. People's, etc., Co. (172 Pa. St. 632; 26 Pittsb. L. J. (N. S.) 410; 37 W. N. C. 442; 33 Atl. Rep. 704), 523
- Allegheny Heating Co. v. Rohan (118 Pa. St. 223; 11 Atl. Rep. 789), 735-768
- Allegheny Oil Co. v. Snyder (106 Fed. Rep. 764; 45 C. C. A. 604), 84, 85, 104, 120, 145, 146
- Allegheny Oil Co. v. Bradford Oil Co. (21 Hun 26, affirmed 86 N. Y. 638), 190
- Allegheny Oil Co. v. Bradford Oil Co. (86 N. Y. 638, affirming 21 Hun 26), 199, 200
- Allen v. Aeyrot Factory (82 Ga. 76; 8 S. E. Rep. 68), 790
- Allen v. New Gas Co. (L. R. 1 Exch. Div. 251; 45 L. J. Exch. 790), 790
- Allen v. Palmer (136 Pa. St. 556; 26 W. N. C. 514; 20 Atl. Rep. 516), 220
- Alliance, etc., Gas Co. v. Dublin (Gas Jr., June 26, 1900, p. 1733, and July 10, 1900, p. 100; 49 Gas Jr. 765, 811; 50 Gas Jr. 1018), 545
- Alliance, etc., Co. v. Taaffe (27 Gas J. 206), 624
- Allison's Appeal (77 Pa. St. 221), 117, 120
- Allison v. Coal Creek, etc., Co. (3 Pick. 60; 9 S. W. Rep. (Tenn.) 226), 278
- Allison Manufacturing Co. v. McCormick (118 Pa. St. 519; 12 Atl. Rep. 273), 781
- Aloway v. Braine (26 Beav. 575; 33 L. T. 100), 314
- Alton Ry., etc., Co. v. Foulds (81 Ill. App. 322, affirming 190 Ill. 367; 60 N. E. Rep. 537), 686
- Altoona v. Shellenberger (6 Pa. Dist. Rep. 544), 573, 610
- Altoona Gas Co. v. Gas Co. of Altoona (17 Pa. Co. Ct. Rep. 662), 530
- American, etc., Co. v. State (46 Neb. 194; 64 N. W. Rep. 711; 30 L. R. A. 447), 577, 600, 610
- American Fire Ins. Co. v. Nugent (7 Ky. Law Rep. 597), 814, 822
- American, etc., Ins. Co. v. Green (16 Tex. Civ. App. 531; 41 S. W. Rep. 74), 809, 811
- American, etc., Assn. v. Yount (101 U. S. 352), 390
- American Steam, etc., Ins. Co. v. Chicago, etc., Co. (57 Fed. Rep. 294; 21 L. R. A. 572), 803
- American Trust Co. v. North Quarry Co. (31 N. J. Eq. 89), 370, 371
- American Window Glass Co. v. Williams (66 N. E. Rep. (Ind. App.) 912), 33, 145, 148, 166, 172, 174, 176, 196, 197, 211, 217, 257
- American W. W. Co. v. Farmers' Loan and Trust Co. (73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563), 381, 460-527
- Ames v. Ames (160 Ill. 599; 43 N. E. Rep. 592), 298
- Aminous v. South Penn. Oil Co. (47 W. Va. 610; 35 S. E. Rep. 1004), 123, 210
- Ampt v. Cincinnati (6 Ohio N. P. 401), 515, 548
- Ampt v. Cincinnati (56 Ohio St. 47; 37 Wkly. L. Bull. 161; 46 N. E. Rep. 69; 35 L. R. A. 737, modifying 12 Ohio C. C. 119; 1 Ohio C. D. 356), 568
- Anaconda, etc., Co. v. Butte, etc., Co. (17 Mont. 519; 43 Pac. Rep. 924), 340, 345

TABLE OF CASES.

xxx

(References are to pages.)

- Anderson v. Hapler** (34 Ill. 435), 44
Anderson v. Savannah (69 Ga. 472), 786
Anderson v. Standard Gaslight Co. (17 N. Y. Misc. 625; 40 N. Y. Supp. 671), 687-709, 712, 721, 728
Andrew v. National Foundry (76 Fed. Rep. 166; 22 C. C. A. 110; 39 L. R. A. 139; 46 U. S. App. 281; 77 Fed. Rep. 774; 23 C. C. A. 454; 46 U. S. App. 619), 380, 381
Andrews v. North River, etc., Co. (23 N. Y. Misc. Rep. 512; 51 N. Y. Supp. 872), 588, 596
Andrews v. Senter (32 Me. 394), 199
Anoka W. W., etc., Co. v. Anoka (109 Fed. Rep. 580), 446-447-502
Appeal of Alegheny (11 Atl. Rep. (Pa.) 658), 518
Apfelbach v. Consolidated Gas Co. (54 Atl. Rep. (Pa.) 359), 757-758
Appleby v. Astor Fire Ins. Co. (54 N. Y. 253), 809
Archer v. Merchants, etc., Co. (43 Mo. 434), 817
Ardesco Oil Co. v. Gilson (63 Pa. St. 146), 782
Argall v. Pitts (78 N. Y. 239), 367
Arkell v. Commerce Ins. Co. (69 N. Y. 191; 25 Am. Rep. 168, affirming 7 Hun 455), 796-798
Armbuster v. Auburn Gaslight Co. (18 N. Y. App. Div. 447; 46 N. Y. Supp. 158), 682-687, 729, 826
Armstrong v. Caldwell (53 Pa. St. 284), 321, 325
Arnold v. Stevens (24 Pick. 106), 323
Ascha v. Fitch (46 Pac. Rep. (Cal.) 298), 362
Ashenfelter v. Williams (7 Colo. App. 332; 43 Pac. Rep. 664), 340
Asher v. Hutchinson Water, etc., Co. (71 Pac. Rep. 813), 534
Aspen Mining, etc., Co. v. Rucker (28 Fed. Rep. 220), 298
Astor v. Hoyt (5 Wend. 603), 365
Astor v. Miller (2 Paige Ch. 68), 365
Atchison St. Ry. Co. v. Missouri Pacific Ry. Co. (31 Kan. 600; 3 Pac. Rep. 284), 488
Atherton v. Betel, etc., Ins. Co. (91 Me. 289; 39 Atl. Rep. 1006), 808
Atkinson v. New Castle W. W. Co. (L. R. 2 Exch. Div. 441; 46 L. J. Exch. 775; 25 W. R. 794; 36 L. T. 761, reversing L. R. 6 Exch. Div. 404; 20 W. R. 35), 587
Atlanta v. Gate City Gaslight Co. (71 Ga. 106), 516
Atlantic Water Works Co. v. Atlantic City (39 N. J. Eq. 367), 481
Atlantic City W. W. Co. v. Atlantic City (48 N. J. L. 378; 6 Atl. Rep. 24), 479, 498
Atlantic City Water Works Co. v. Consumers' Water Co. (44 N. J. Eq. 427; 15 Atl. Rep. 581), 481-492-498
Atlantic City W. W. Co. v. Reed (50 N. J. L. 665; 15 Atl. Rep. 10), 454, 468, 469, 499
Atlantic Dock, etc., Co. v. Leavitt (54 N. Y. 35; 13 Am. Rep. 556), 102
Attersoll v. Stevens (1 Taunt. 183), 42
Attorney-General v. Cambridge Consumers' Gas Co. (L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145, overruling L. R. 6 Eq. 282; 38 L. J. Ch. 94, 111; 17 W. R. 145; 17 Gas Jr. 427, 593, 867), 537, 543, 674
Attorney-General v. Gaslight Co. (7 Ch. Div. 217; 47 L. J. Ch. 534; 37 L. T. 746; 26 W. R. 125), 665, 671, 674
Attorney-General v. Manchester Corporation ([1893] 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343; 3 R. 427), 663, 674

(References are to pages.)

- Attorney-General v. Mayor of St. Helens** (W. N. (1870) 150), 569
Attorney-General v. Sheffield Gas Consumers' Co. (3 De. Gex. McN. and G. 304; 17 Jur. 677; 22 L. J. Ch. 811; 2 Gas J. 396, 419; 19 E. L. and Eq. 639; 1 W. R. 185), 537-542
Atwood v. Small (7 B. & C. 390), 345
Audenried v. Woodward (4 Dutch. (N. J.) 265), 641
Aurora Gaslight Co. v. Bishop (81 Ill. App. 493), 713, 716, 717, 730, 750
Austin v. Austin Gaslight Co. (69 Tex. 180; 7 S. W. Rep. 200), 835
Austin v. Bartholomew (107 Fed. Rep. 349; 46 C. C. A. 327), 460-528
Austin v. Cambridgeport (21 Pick. 215), 185
Austin v. Huntsville Coal, etc., Co. (72 Mo. 535), 76
Avon Coal Co. v. McCulloch (59 Md. 403; 43 Am. Rep. 560), 620
Aye v. Philadelphia Co. (193 Pa. St. 457; 44 Atl. Rep. 556), 104, 127, 132
- B**
- Babcock v. Fitchburg R. R. Co.** (140 N. Y. 308; 35 N. E. Rep. 596), 701
Babcock v. Scoville (56 Ill. 461), 238
Babcock v. Stewart (58 Pa. St. 179), 351
Bacon v. U. S., etc., Co. (123 N. Y. 304; 25 N. E. Rep. 399; G. L. R. A. 617, reversing 3 N. Y. Supp. 237), 828
Badger Lumber Co. v. Marion, etc., Co. (48 Kan. 187; 30 Pac. Rep. 117, affirming 29 Pac. Rep. 476), 363
Badger v. Platte (68 N. H. 222; 44 Atl. Rep. 296), 827
Bagley v. Consolidated Gas Co. (13 N. Y. Misc. Rep. 6; 34 N. Y. Supp. 187), 792
Bailey v. Citizens' Gaslight Co. (27 N. J. Eq. 196), 536
Bailey v. Fayette Gas Fuel Co. (193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505), 577, 578, 597, 603
Bailey v. Haines (15 Q. B. 533; 19 L. J. Q. B. 73; 14 Jur. 835), 345
Bailey v. Philadelphia (184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837, affirming 6 Pa. Dist. Rep. 727; 20 Pa. Co. Ct. Rep. 173), 559-569, 572, 573
Baird v. Reilly (92 Fed. Rep. 884), 791
Baker v. Atherton (15 Pa. Co. Ct. Rep. 471), 370-645
Baker v. Brennan (12 Ohio C. D. 211; 22 Ohio C. D. 241), 307, 349
Baker v. Clark (128 Cal. 181; 60 Pac. Rep. 677), 81
Baker v. Dale (3 Pitts. L. J. 190), 72
Baker v. Hart (123 N. Y. 470; 25 N. E. Rep. 948), 49
Baker v. Kellogg (29 Ohio St. 663), 103
Baker v. McDowell (3 W. & S. 358), 329
Baldwin v. North Branford (32 Conn. 47), 563
Baldwin v. Ohio Oil Co. (13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50), 127, 202, 209
Balfour v. Russell (167 Pa. St. 287; 36 W. N. C. 225; 31 Atl. Rep. 570), 126, 152, 154
Ball v. Nye (99 Mass. 582), 661
Ballard v. Tomlinson (29 Ch. Div. 115; 54 L. J. Ch. 454; 52 L. T. 942; 33 W. R. 533; 49 J. P. 692; 24 Am. L. Reg. 634), 661
Baltimore Gas Co. v. Colliday (25 Md. 1), 576, 590, 597, 607, 609

TABLE OF CASES.

xxxiii

(References are to pages.)

- Baltimore Consolidated Gas Co. v. Getty (54 Atl. Rep. (Md.) 660), 709, 749
- Baltimore, etc., Co. v. People (66 N. E. Rep. (Ill.) 246), 447, 566
- Bank of Augusta v. Earl (13 Pet. 519, 595), 519
- Bank of Ogdensburgh v. Arnold (5 Paige Ch. 38), 366
- Bankart v. Tennant (L. R. 1 Eq. 141; 39 L. J. Ch. 809; 23 L. T. 137; 18 W. R. 639), 315
- Barclay. *Ex parte, In re Joyce* (L. R. 9 Ch. App. 576), 647
- Barker v. Dale (3 Pittsb. 190), 97 105
- Barksdale v. Adairston (81 Va. 764), 81, 82, 83
- Barksdale v. Parker (87 Va. 141; 12 S. E. Rep. 342), 78
- Barnford v. Lehigh Zinc and Iron Co. (33 Fed. Rep. 677), 85
- Barnard v. National Fire Ins. Co. (27 Mo. App. 26), 815
- Barney v. Burstenbinder (7 Lans. 210), 405
- Barnhart v. Lockwood (152 Pa. St. 82; 31 W. N. C. 209; 25 Atl. Rep. 237), 73, 148, 163, 166, 168, 210
- Barnsdall v. Boley (119 Fed. Rep. 191), 98, 99, 101, 102, 114, 182, 189, 190, 197, 198, 206, 217, 290
- Barnum v. Landon (25 Conn. 137), 301
- Barrett v. McAllister (33 W. Va. 738; 11 S. E. Rep. 220), 89, 92
- Barrickman v. Marion Oil Co. (45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92), 687, 691, 701, 709, 725, 726
- Barrs v. Lea (33 L. J. Ch. 437), 273
- Barry v. Worcester (143 Mass. 476; 10 N. E. Rep. 186), 82
- Bartholomew v. Austin (85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568), 480, 491, 498
- Bartholomew v. Merchants' Insurance Co. (25 Ia. 507; 96 Am. Dec. 65), 822
- Bartlett v. Boston Gaslight Co. (117 Mass. 533), 844
- Bartlett v. Boston Gaslight Co. (122 Mass. 209; 117 Mass. 533; 19 Am. Rep. 421), 711, 720, 737, 741, 746, 749, 752, 753
- Bartley v. Phillips (179 Pa. St. 175; 36 Atl. Rep. 217; 165 Pa. St. 325; 36 W. N. C. 19; 30 Atl. Rep. 842), 114, 161, 184, 186
- Bartley v. Phillips (165 Pa. St. 325; 30 Atl. Rep. 842), 160, 161, 216
- Bartlett v. Phillips (4 De G. & J. 414), 288
- Barton Coal Co. v. Cox (39 Md. 1), 49
- Bastian v. Keystone Gas Co. (27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; 4 Am. Neg. Rep. 529), 681, 682, 686, 708, 713, 728
- Batchelder v. Tunbridge, etc., Co. (84 L. T. 765; 65 J. P. 680), 672
- Batcheller v. Tunbridge Wells Gas Co. (65 J. P. 680; 84 L. T. 765), 653, 695
- Batchelor v. Yates (38 Ch. Div. 112), 647
- Bateman v. Bluck (14 Eng. L. and Eq. 69), 512
- Bath Gaslight Co. v. Claffy (74 Hun 638; 26 N. Y. Supp. 287), 420, 426, 527, 577, 578
- Baumgardner v. Browning (12 Ohio Civ. Ct. Rep. 73; 5 Ohio C. D. 394), 166, 208
- Baumgardner v. Ins. Co. (1 W. N. C. 119), 817
- Baxendole v. McMurray (L. R. 2 Ch. 790; 16 W. R. 32), 674
- Bear River, etc., Co. v. N. Y. Mining Co. (8 Cal. 327), 654
- Beatty v. Gregory (17 Ia. 109; 85 Am. Dec. 546), 83, 160

(References are to pages.)

- Beaufort (Duke) v. Bates (3 De G. F. and J. 381; 31 L. J. Ch. 481), 648
- Beck v. O'Conner (21 Mont. 109; 53 Pac. Rep. 94), 308
- Beckner v. Werner (98 Pa. St. 555), 209
- Bedding v. Imperial Gaslight Co. (7 Gas J. 418), 590
- Bedford's Appeal (126 Pa. St. 117; 17 Atl. Rep. 538), 291
- Bedford v. Terhune (30 N. Y. 457), 246
- Begbie v. Fenwick (L. R. 8 Ch. App. 1075), 647
- Behling v. Southwestern, etc., Pipe Lines (160 Pa. St. 359; 28 Atl. Rep. 777), 401
- Beinville Water Supply Co. v. Mobile (186 U. S. 212; 22 Sup. Ct. Rep. 820, affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40), 478, 494, 502
- Beittenmiller v. Bergner, etc., Co. (12 Atl. Rep. (Pa.) 599), 736
- Bel v. Balls ([1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378), 314
- Belfast Water Co. v. Belfast (92 Me. 52; 42 Atl. Rep. 235), 542
- Bell v. Truit (9 Bush. 257), 130
- Bellaire Goblet Co. v. Findlay (5 Ohio Cir. Ct. Rep. 418), 431, 570, 597, 607, 610
- Bellany v. Debenham ([1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 468; 39 W. R. 257), 315
- Belvidere Gaslight Co. v. Jackson (81 Ill. App. 424), 673, 682, 687, 694, 703, 707
- Benavder v. Hunt (79 Tex. 383; 15 S. W. Rep. 396), 199, 210
- Benedict v. Construction, etc., Co. (49 N. J. Eq. 23; 23 Atl. Rep. 485), 412, 414, 415, 426
- Benfield v. Vacuum Oil Co. (75 Hun 209; 27 N. Y. Supp. 16), 783
- Benfieldside L. B. v. Consett Iron Co. (3 Exch. Div. 54; 47 L. J. Exch. 491; 38 L. T. 530; 26 W. R. 114), 547
- Bennett v. North British, etc., Co. (8 Daly 471; 81 N. Y. 273; 37 Am. Rep. 501), 798
- Bennett v. East Chester Gaslight Co. (40 N. Y. App. Div. 169; 57 N. Y. St. Rep. 847), 602, 610
- Bennett v. North British, etc., Ins. Co. (8 Daly 471), 53
- Bennett v. Thompson (13 Ired. L. 146), 48
- Bennington v. Smith (29 Vt. 254), 513
- Benson v. Allegheny Heating Co. (188 Pa. St. 614; 41 Atl. Rep. 729), 691
- Benson v. Malden, etc., Co. (6 Allen 149), 549
- Benson, etc., Co. v. Alta, etc., Co. (145 U. S. 428; 12 Sup. Ct. Rep. 877), 48
- Bentley v. Bates (4 Y. & C. Exch. 182; 9 L. J. Exch. 30; 4 Jur. 552), 373, 378
- Bently v. Lumbermen's Ins. Co. (191 Pa. St. 276; 43 Atl. Rep. 209), 808
- Benton v. Elizabeth (61 N. J. L. 693; 40 Atl. Rep. 1132, affirming 39 Atl. Rep. 683), 531, 532, 533
- Berger v. Hoerner (36 Ill. App. 360), 640
- Berger v. Minneapolis, etc., Co. (60 Minn. 296; 62 N. W. Rep. 336), 662, 666
- Berns v. Gaston Coal Co. (27 W. Va. 285), 725
- Berridge v. Ward (10 C. B. (N. S.) 400; 30 L. J. C. P. 218; 7 Jur. (N. S. 876; 2 F. & F. 208), 333
- Berry v. Woodburn (107 Cal. 504; 40 Pac. Rep. 802), 344
- Bestwick v. Druesby Coal Co. (129 Pa. St. 592; 18 Atl. Rep. 538), 161, 168

TABLE OF CASES.

xxxv

(References are to pages.)

- Bethune v. Hughes (28 Ga. 560), 488
- Bettman v. Harness (42 W. Va. 443; 26 S. E. Rep. 271; 36 L. R. A. 566), 51, 98, 120, 173, 182, 289
- Bettman v. Shadle (22 Ind. App. 542; 53 N. E. Rep. 662), 189, 212, 217, 267
- Bewick v. Fletcher (41 Mich. 625), 641
- Bewick v. Muir (83 Cal. 373; 23 Pac. Rep. 390), 354, 362
- Beyer v. Consolidated Gas Co. (44 N. Y. App. Div. 158; 60 N. Y. Supp. 628), 724, 757, 765
- Bicknell v. Austin (62 Fed. Rep. 432), 101
- Biddle v. Wayne W. W. Co. (7 Del. Co. Rep. 161), 552
- Bienville Water, etc., Co. v. Mobile (112 Ala. 260; 20 So. Rep. 742; 33 L. R. A. 59), 609, 612
- Billings v. Alfsen Mining, etc., Co. (51 Fed. Rep. 338), 174
- Billings v. Taylor (10 Pick. 460), 287
- Binghamton Bridge (3 Wall. 51), 493
- Binkley v. Forkner (117 Ind. 176; 19 N. E. Rep. 753), 629, 631
- Birch v. Wright (1 T. R. 378), 367
- Bird v. Crabb (30 L. J. Ex. 318), 648
- Birmingham, *Ex parte* (L. R. 11 Eq. 615; L. R. 11 Eq. 204), 606
- Birmingham Fire Ins. Co. v. Kroegher (83 Pa. St. 64; 24 Am. Rep. 147), 810, 816, 823, 824
- Birmingham, etc., Co. v. Ratcliffe (L. R. 6 Exch. 224), 605
- Bishop v. North Adams Fire District (167 Mass. 364; 45 N. E. Rep. 925), 391
- Bishop of Winchester v. Knight (1 P. Arns. 406), 277
- Bissell v. Foss (114 U. S. 252; 5 Sup. Ct. Rep. 851, affirming 4 Fed. Rep. 694; 2 McCrary 73), 340, 341
- Biven v. Ohio Oil Co. (11 Ohio C. C. Dec. 810; 21 Ohio C. C. 117, affirmed 65 Ohio St. 507; 63 N. E. Rep. 76), 88
- Black v. Chester (175 Pa. St. 101; 34 Atl. Rep. 354), 454
- Black v. Delaware, etc., Co. (24 N. J. Eq. 455, 474), 528
- Black v. Delaware, etc., R. R. Co. (22 N. J. Eq. 130), 527
- Black Lick Co. v. Saltsburg Gas Co. (139 Pa. St. 448; 21 Atl. Rep. 432), 120, 592, 610, 611, 612
- Bladen v. Philadelphia (60 Pa. St. 464), 469
- Blair v. Northwestern, etc., Co. (12 Ohio Cir. Ct. Rep. 78; 5 Ohio Cir. Dec. 620), 152, 156, 220, 225, 247
- Blair v. Peck (1 Penny (Pa.) 247), 122
- Blakeley v. Wershall (174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74), 289, 293
- Blaker v. Sands (29 Kan. 551), 346
- Blenkiron v. Great Central Gas, etc. (2 F. and F. 437; 2 Gas J. 292, 776; 3 L. T. (N. S.) 317), 685, 763
- Blewett v. Coleman (40 Pa. St. 45), 296
- Blindert v. Kreiser (81 Wis. 174; 5 N. W. Rep. 324), 359
- Block v. Murray (12 Mont. 545; 31 Pac. Rep. 550), 354, 359
- Blondell v. Consolidated Gas Co. (89 Md. 732; 43 Atl. Rep. 817; 46 L. R. A. 187), 620, 624
- Bloodworth v. Stevens (51 Miss. 475), 251
- Bloomington v. Wahl (46 Ill. 489), 488
- Bloomfield Coal, etc., Co. v. Tidrick (99 Ia. 83; 68 N. W. Rep. 570), 83

TABLE OF CASES.

(References are to pages.)

- Bloomfield, etc., Co. v. Calkins (62 N. Y. 386; 1 T. & C. 549), 552
- Bloomfield, etc., R. R. Co. v. Richardson (63 Barb. 437), 383, 388, 390, 552, 585
- Bloomfield, etc., Gas Co. v. Calkins (1 T. & C. (N. Y.) 549), 391, 392, 761
- Bluestone Coal Co. v. Bell (38 W. Va. 297; 18 S. E. Rep. 493), 165
- Bly v. United States (4 Dill. 469), 296
- Board v. Boatman's Ins. Co. (5 Mo. App. 91), 238
- Board v. Hopkinsville (95 Ky. 239; 24 S. W. Rep. 872; 44 Am. St. Rep. 222; 23 L. R. A. 402), 451
- Board v. Indianapolis (132 Ind. 27; 33 N. E. Rep. 972), 513
- Board v. Indianapolis, etc., Co. (134 Ind. 209; 33 N. E. Rep. 972), 389, 391, 549, 550, 554
- Board v. People (91 Ill. 80), 519
- Board, etc., Co. v. Barnett (107 Ill. 507), 553
- Boardman v. Wilson (L. R. 4 C. B. 57), 246
- Boatman's Fire Ins. Co. v. Parker (23 Ohio St. 85), 803
- Bockover v. Post (25 N. J. L. 285), 246
- Bogot v. Bogot (32 Beav. 509), 288
- Bohan v. Port Jervis Gas Co. (122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711), 664, 666, 672, 685
- Bonetti v. Treat (91 Cal. 223; 27 Pac. Rep. 612), 231, 245
- Boone v. Stover (66 Mo. 430), 82
- Boothman v. Mayor, etc., of Burnley (20 Gas J. 585), 722, 763
- Borland's Appeal (66 Pa. St. 470), 234
- Boston v. Binney (11 Pick. 1), 277
- Boston v. Richardson (13 Allen 160), 548
- Boston Franklin, etc., Co. v. Conditt (19 N. J. Eq. 394), 299
- Boucher v. Medverhill (1 Mont. 306), 246
- Bowen v. Bowen (18 Conn. 535), 190
- Bowen v. Stenson (24 Beav. 631), 317
- Bowling Green v. Carson (10 Bush. 64), 488
- Boyd v. McCombe (4 Pa. St. 146), 251
- Boydell v. Dummond (11 East. 142), 314
- Boydston v. Meacham (28 Mo. App. 494), 237
- Boyer v. Fulmer (176 Pa. St. 282; 35 Atl. Rep. 235), 162
- Boyer v. Grand Rapids Fire Ins. Co. (124 Mich. 455; 83 N. W. Rep. 124), 815, 797
- Boyer v. Little Falls (5 N. Y. App. Div. 1; 38 N. Y. Supp. 1114), 546
- Boys v. Robinson (38 Atl. Rep. (N. J.) 50 Pac. Rep. 347), 359
- Boys v. Robinson (38 N. J. L. 813), 188, 194, 190, 211, 218
- Boyston v. Miller, 298
- Brace v. New York Central R. R. Co. (27 N. Y. 269), 512
- Brady v. Detroit Street, etc., Co. (102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175), 662, 666, 685, 776
- Bradford Oil Co. v. Blair (113 Pa. St. 83; 4 Atl. Rep. 218), 108, 114, 123, 231, 233, 239
- Bradley v. Harkness (26 Cal. 69), 338
- Braintree Water Supply Co. v. Braintree (146 Mass. 482; 16 N. E. Rep. 420), 503
- Brand v. Hammersmith Rail Co. (L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. (Va.) 238; 18 W. R. 12), 671
- Brass v. Rathbone (153 N. Y. 435; 47 N. E. Rep. 905, affirming 8 N. Y. App. Div. 78; 40 N. Y. Supp. 466), 495, 573, 607, 610

TABLE OF CASES.

xxxvii

(References are to pages.)

- Breckenridge v. Deleware, etc., R. Co. (N. J.) 33 Atl. Rep. 800), 394
- Breckenridge v. Parrott (15 Ind. App. 411; 44 N. E. Rep. 66), 112, 231, 237, 245, 259, 267, 270
- Brenham v. Brenham Water Co. (67 Tex. 542; 4 S. W. Rep. 143), 498, 508, 542
- Brick, etc., Co. v. Pond (38 Ohio St. 65), 162
- Bridgeport v. New York, etc., R. R. Co. (36 Conn. 266), 519
- Bridge Proprietors v. Hoboken (1 Wall. 116), 493
- Briggs v. North American, etc., Ins. Co. (53 N. Y. 446), 804
- Briggs v. Davis (81½ Pa. St. 471), 77
- Brinkley v. Hambleton (67 Md. 169; 8 Atl. Rep. 904), 244
- Bristol v. Bristol, etc., W. W. (19 R. I. 413; 34 Atl. Rep. 359; 32 L. R. A. 740), 563
- Bristol, etc., Co. v. Bristol, etc., Co. (99 Tenn. 371; 42 S. W. Rep. 19), 362, 363
- Broadway, etc., Co. v. Hankey (31 Md. 346), 479
- Broadbent v. Imperial Gaslight Co. (7 H. L. Cas. 600; 3 Jur. (N. S.) 221; 5 Gas J. 342; 9 Gas J. 751, affirming 7 DeG. M. & G. 436; 26 L. J. Ch. 276; 5 Jur. (N. S.) 1319), 662, 665, 674, 676
- Bromas v. Young (35 Hun 173), 365, 366
- Bronson v. Lane (91 Pa. St. 153), 106
- Bronx Gas, etc., Co. v. New York (17 N. Y. Misc. 433; 41 N. Y. Supp. 358), 451, 456, 470
- Brooklyn City, *In re* (143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270), 492, 496
- Brooklyn v. Fulton Municipal Gas Co. (7 Abb. N. C. 19), 587
- Brooklyn v. Jourdan (7 Abb. N. C. 23), 522
- Brooks v. Hanna (19 Ohio C. Ct. Rep. 216; 10 Ohio Dec. 480), 237, 288
- Brooks v. Kunkle (24 Ind. App. 624; 57 N. E. Rep. 260), 263
- Brown v. Beecher (120 Pa. St. 590; 15 Atl. Rep. 608), 64, 75, 82, 224, 350, 356
- Brown v. Bragg (22 Ind. 122), 199
- Brown v. Corey (43 Pa. St. 405), 77
- Brown v. Corry (175 Pa. St. 528; 34 Atl. Rep. 854, affirming 4 Pa. Dist. Rep. 645; 17 Pa. Co. Ct. Rep. 400), 450
- Brown v. Fowler (65 Ohio St. 507; 63 N. E. Rep. 76), 71, 85, 86, 99, 152, 172, 173
- Brown v. Illius (25 Conn. 583), 651, 661, 665, 723
- Brown v. Jaquette (94 Pa. St. 113), 342
- Brown v. Kidger (3 H. & N. 853; 28 L. J. Exch. 66), 348
- Brown v. Magorty (156 Mass. 209; 30 N. E. Rep. 1021), 278
- Brown v. New York Gaslight Co. (Anthon N. P. 351), 716, 749
- Brown v. Ohio Oil Co. (21 Ohio C. C. 117; 11 Ohio C. C. Dec. 810, affirmed 65 Ohio St. 507; 63 N. E. Rep. 76), 84
- Brown v. Spilman (155 N. S. 665; 15 Sup. Ct. Rep. 245, reversing 45 Fed. Rep. 291), 32, 51, 53, 97, 698
- Brown v. Torrence (88 Pa. St. 186), 654
- Brown v. Vandergrift (80 Pa. St. 142), 34, 146, 178, 182, 195, 264
- Brum's Appeal (12 Atl. Rep. (Pa.) 855), 607, 608
- Brunot's Estate, *In re* (29 Pittsb. L. J. (N. S.) 105), 69, 229

TABLE OF CASES.

(References are to pages.)

- Brunswick Gaslight Co. v. U. S., etc., Co.), 85 Me. 532; 27 Atl. Rep. 525; 35 Am. St. Rep. 385; 43 Am. & Eng. Corp. Cas. 459), 459, 527, 546, 577
- Brush Electric Light Co. v. Cincinnati (28 Wkly. Law Bull. 29; 27 Wkly. Law Bull. 412; 11 Ohio Dec. 581), 455
- Brush Electric Light, etc., Co. v. Montgomery (114 Ala. 433; 21 So. Rep. 960), 462, 463
- Brush Electric Light Co. v. Philadelphia (8 Pa. Dist. Rep. 231), 838
- Brushwood Developing Co. v. Hickey (16 Atl. Rep. (Pa.) 70; 2 Mon. (Pa.) 65), 253, 262
- Bryan v. Bancks (4 Barn. & Ald. 401), 182
- Bryant v. Poughkeepsie, etc., Ins. Co. (17 N. Y. 200, affirming 21 Barb. 154), 816, 817
- Brymer v. Butler Water Co. (179 Pa. St. 331; 27 Pittsb. L. J. (N. S.) 285; 39 W. N. C. 439; 36 Atl. Rep. 249; 36 L. R. A. 260), 433
- Bryn Mawr Water Co. v. Lower Marion Tp. (15 Pa. Co. Ct. Rep. 527; 4 Pa. Dist. Rep. 157), 542
- Buchanan v. Cole (57 Mo. App. 11), 75, 79
- Buchanan v. Exchange Fire Ins. Co. (61 N. Y. 26), 798
- Buckeye Pipe Line Co. v. Fee (15 Ohio C. C. 673), 388
- Buckley v. Kenyon (10 East. 139), 48
- Budd v. New York (143 U. S. 517; 12 S. Ct. Rep. 468), 432
- Buesching v. St. Louis, etc., Co. (73 Mo. 219; 11 Rep. 675, reversing 6 Mo. App. 85), 789
- Buffalo v. Buffalo Gas Co. (80 N. Y. Supp. 1093), 618, 625, 626
- Buffalo v. Webster (10 Wend. 100), 488
- Buffalo Gas Co. *In re* (73 Fed. Rep. 191), 32
- Buhl v. Thompson (3 Penny. (Pa.) 267), 161
- Bullmaster v. St. Joseph (70 Mo. App. 60), 722
- Burbank v. Pillsbury (48 N. H. 475), 102
- Burdon v. Barkai (3 Giff. 412; 31 L. J. Ch. 521; 8 Jur. (N. S.) 130; 5 L. T. 573), 350
- Burgan v. Lyell (2 Mich. 102; 55 Am. Dec. 53), 338, 349
- Burkhardt v. Striger (67 S. W. Rep. (Ky.) 270), 418, 419
- Burlington Water Co. v. Woodward (49 Ia. 58), 450
- Burmester v. Norris (21 L. J. (N. S.) Exch. 43; 6 Exch. 796; 17 L. T. 232), 348
- Burnes v. McCubbin (3 Kan. 221), 247
- Burnell v. Brown (1 J. and W. 168), 317
- Burnett v. Lynch (5 B. & C. 589; 8 D. & R. 368; 4 L. J. (O. S.) K. B. 274), 244, 245
- Burnham v. Roberts (103 Mass. 379), 277
- Burrows v. March Gas & Coke Co. (L. R. 7 Exch. 96; 41 L. J. Exch. S.) 24), 692
- Burrows v. March Gas & Coke Co. (L. R. 7 Exch. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493), 584, 709, 731, 733
- Burton v. Barclay (7 Bing. 745), 238
- Burton v. Forest Oil Co. (54 Atl. Rep. (Pa.) 266), 136, 140, 246
- Busby v. Russell (18 Ohio Cir. Ct. Rep. 12; 10 Ohio C. D. 23), 254, 273
- Bush v. Seabury (8 Johns. 418), 488
- Bush v. Sullivan (3 Greene (Ia.) 344; 54 Am. Dec. 506), 83

TABLE OF CASES.

xxxix

(References are to pages.)

- Buskirk v. King** (72 Fed. Rep. 22), 120
Butcher v. Providence Gas Co. (12 R. I. 149; 34 Am. Rep. 626; 18 Alb. L. Jr. 372), 687, 718, 729, 735, 758, 761, 762, 764
Butchers' Union, etc., Co. v. Crescent City, etc., Co. (111 U. S. 746; 4 Sup. Ct. Rep. 652), 420, 664, 675
Butler Savings Bank v. Osborne (159 Pa. St. 10; 28 Atl. Rep. 163), 336, 342
Butt v. Ellett (19 Wall. 544), 229
Butt v. Imperial Gaslight & Coke Co. (L. R. 2 Ch. 158; 14 L. T. R. 349; 15 Gas J. 139), 665, 674
- C
- Caballero v. Home Insurance Co.** (15 La. Ann. 217), 804
Cadman v. Jenkins (14 Mass. 93), 277
Cahoon v. Bayaud (123 N. Y. 298; 25 N. E. Rep. 376), 79, 90
Caldwell v. Alton (33 Ill. 417), 488
Caldwell v. Copeland (37 Pa. St. 427; 78 Am. Dec. 436), 77, 321, 324, 325
Caldwell v. Fulton (31 Pa. St. 475), 73, 77, 80, 105
Caley v. Portland (12 Colo. App. 397; 56 Pac. Rep. 350), 254
Caley v. Portland (71 Pac. Rep. (Colo.) 892), 197
Calhoon v. Neely (201 Pa. St. 97; 59 Atl. Rep. 957), 160, 166
California Oil Gas Co. v. Miller (96 Fed. Rep. 12), 140, 327
Calkins v. Bloomfield, etc., Gas Co. (1 T. & C. (N. Y.) 541), 391
Camden v. Murray (16 Ch. Div. 161; 50 L. J. Ch. 282; 43 L. T. 661; 29 W. R. 190), 279
Campbell v. Lloyd's Bank ([1891] 1 Ch. 136, note), 372, 377
Campbell v. Roddy (44 N. J. Eq. 244; 14 Atl. Rep. 279), 630, 631
Campbell v. Seaman (63 N. Y. 568; 20 Am. Rep. 567), 663
Campbell v. Wardlow (L. R. 8 App. Cas. 641), 287
Canfield v. Ford (28 Barb. 336), 299
Capehart v. Foster (61 Minn. 132; 63 N. W. Rep. 257; 52 Am. St. Rep. 532), 636
Capitol City Gaslight Co. v. Charter Oak Ins. Co., 834
Capital, etc., Co. v. Gaines (20 Ky. L. Rep. 1464; 49 S. W. Rep. 402, 462), 605, 618, 625
Capital City, etc., Co. v. Tallahassee (42 Fla. 462; 28 So. Rep. 810), 488
Capital Gas Co. v. Young (109 Cal. 140; 41 Pac. Rep. 869; 29 L. R. A. 463), 475
Capital City Gaslight Co. v. Des Moines (72 Fed. Rep. 829), 421, 422, 426, 427, 428, 431, 432
Capital City Gaslight Co. v. Des Moines (93 Ia. 547; 61 N. W. Rep. 1066; 48 Am. and Eng. Corp. Cas. 138), 462
Capital City Water Co. v. State (105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743), 523, 539, 540
Capner v. Mining Co. (2 Green (N. J.) Ch. 467), 370
Capron v. Strout (11 Nev. 304), 357
Carey v. Bight (58 Pa. St. 70), 641
Carhart v. Auburn Gaslight Co. (22 Barb. 297), 654, 661, 663, 673
Carleton v. Lombard, etc., Co. (149 N. Y. 137; 43 N. E. Rep. 422; 149 N. Y. 35; 44 N. E. Rep. 183), 786, 787
Carley v. Lewis (24 Ind. 23), 233
Carlin v. Western, etc., Co. (57 Md. 515; 40 Am. Rep. 440), 796, 799, 800, 821

TABLE OF CASES.

(References are to pages.)

- Carlisle Gas & Water Co. v. Carlisle Water Co. (182 Pa. St. 17; 37 Atl. Rep. 821), 483, 514, 515
- Carlson v. Sultman (28 Neb. 672; 44 N. W. Rep. 873), 390
- Carlyle v. Carlyle, etc., Co. (52 Ill. App. 577), 437
- Carmichael v. Texarkana (94 Fed. Rep. 561), 664
- Carmody v. Boston Gaslight Co. (162 Mass. 539; 39 N. E. Rep. 184), 702, 768
- Carne v. Mitchell (15 L. J. (N. S.) Ch. 287), 318
- Carnegie Natural Gas Co. v. Philadelphia Co. (158 Pa. St. 317; 27 Atl. Rep. 951), 132, 192
- Carner v. Peters (9 Pa. Super. Ct. Rep. 29; 43 W. N. C. 261), 320
- Carother's Appeal (118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48), 491, 501, 530
- Carother v. Philadelphia Co. (118 Pa. St. 468; 12 Atl. Rep. 314), 383, 388
- Carr v. Benson (L. R. 3 Ch. App. 524; 78 L. T. 696; 16 W. R. 744), 79
- Carrhart v. Montana, etc., Co. (1 Mont. 245), 78
- Carrigan v. Lycoming Fire Ins. Co. (53 Vt. 418; 38 Am. Rep. 687), 825
- Carroll v. Provincial, etc., Co. (26 Can. S. C. 591), 83
- Carter v. County Court (45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725), 840, 841
- Carter v. Hammett (18 Barb. 608), 238
- Carter v. Producers', etc., Oil Co. (164 Pa. St. 463; 30 Atl. Rep. 391), 352
- Carter v. Tyler County Court (45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725), 52
- Carterville Improvement, etc., Co. v. Carterville (89 Ga. 683; 16 S. E. Rep. 25), 468
- Cary Hardware Co. v. McCarty (10 Colo. App. 200; 50 Pac. Rep. 744), 62
- Case v. Haight (3 Wend. 632), 328
- Cassell v. Crothers (193 Pa. St. 359; 44 Atl. Rep. 446), 152, 153, 221
- Catlin Coal Co. v. Lloyd (176 Ill. 275; 52 N. E. Rep. 144; 180 Ill. 398; 54 N. E. Rep. 214), 321, 326
- Central Land Co. v. Laidley (32 W. Va. 134; 9 S. E. Rep. 61), 281
- Central Transportation Co. v. Pullman Palace Car Co. (139 U. S. 24; 11 Sup. Ct. Rep. 473), 528
- Central Trust Co. v. Berwind White Coal Co. (95 Fed. Rep. 391), 278, 368
- Central Trust, etc., Co. v. Cincinnati, etc., Co. (26 Wkly. Law Bull. 149; 11 Ohio Dec. Rep. 348), 633, 635
- Central Trust Co. v. Sheffield, etc., Co. (42 Fed. Rep. 106), 355
- Centre Hall Water Co. v. Centre Hall (186 Pa. St. 74; 40 Atl. Rep. 153), 464, 480, 483
- Cerf v. Home Ins. Co. (44 Cal. 320; 13 Am. Rep. 165), 811, 816
- Chadwick v. Corporation of Wigan (28 Gas J. 562), 718, 722, 762
- Chamberlain v. Dow (16 W. N. C. (Pa.) 532), 63, 72, 238, 279
- Chamberlain v. Parker (40 N. Y. 569; 45 N. Y. 569), 115, 122, 264
- Chamberlain v. Summit Gas Co. (13 Penny. (Pa.) 261), 615
- Chambers v. Smith (183 Pa. St. 122; 38 Atl. Rep. 522), 107, 142, 268
- Chandler v. Pittsburgh, etc., Co. (20 Ind. App. 165; 50 N. E. Rep. 400), 229

TABLE OF CASES.

xli

(References are to pages.)

- Chapman v. Crays' Gas Co. (13 Gas J. 448), 537
- Chapman v. South, etc., Co (61 Gas J. 359, 415, 460), 651
- Charity Hospital v. New Orleans Gaslight Co. (40 La. Ann. 382; 4 So. Rep. 433), 468
- Charles v. Eshleman (5 Colo. 107), 340, 342, 344, 348, 349
- Charles v. Froebel (47 Mo. App. 45), 171, 245
- Charlotte v. Shepard (120 N. C. 411; 27 S. E. Rep. 109), 563
- Charters of Gas Companies (5 Pa. Dist. Rep. 39* 18 Pa. Co. Ct. Rep. 136), 482
- Charters of Gas Companies, *In re* (18 Pa. Co. Ct. Rep. 136; 5 Pa. Dist. Rep. 396), 530
- Chartiers Block Coal Co. v. Mellon (152 Pa. St. 286; 25 Atl. Rep. 597; 18 L. R. A. 702), 94, 397
- Chartiers Valley Gas Co. v. Lynch (118 Pa. St. 362; 12 Atl. Rep. 435), 754
- Chartiers Valley Gas Co. v. Waters (123 Pa. St. 220; 16 Atl. Rep. 423; 25 Am. and Eng. Corp. Cas. 400), 754
- Chasemore v. Richards (7 H. L. Cas. 349; 2 H. & N. 168; 29 L. J. Exch. 81; 5 Jur. (N. S.) 873; 7 W. R. 685), 48
- Cheesman v. Shreve (40 Fed. Rep. 787), 49
- Cheney v. Cook (7 Wis. 357), 95
- Cherokee, etc., Co. v. Wilson (47 Kan. 460; 28 Pac. Rep. 178), 53, 698
- Chevington & Burn Co. v. Lewis (10 W. N. C. (Pa.) 196), 839
- Chicago v. Rumpff (45 Ill. 90; 92 Am. Dec. 196), 488
- Chicago Economic Fuel Co. v. Myers (168 Ill. 139; 48 N. E. Rep. 66, affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276), 693
- Chicago Gaslight & Coke Co. v. People's, etc., Co. (121 Ill. 530; 13 N. E. Rep. 169; 2 Am. St. Rep. 124, reversing 20 Ill. App. 473), 460, 503, 527, 536
- Chicago, etc., Co. v. Lake (130 Ill. 42; 22 N. E. Rep. 616, affirming 27 Ill. App. 346), 432, 513, 514, 515, 520, 524, 538
- Chicago, etc., Co. v. United States Co. (57 Pa. St. 83), 72, 81
- Chicago, etc., Ry. v. Minnesota (134 U. S. 418), 430, 431
- Chicago, etc., Ry. v. Wellman (143 U. S. 339), 431
- Chicago R. R. Co. v. People (73 Ill. 541), 520
- Chicago Smokeless Fuel Gas Co. v. Lyman (62 Ill. App. 538), 361
- Child v. Starr (4 Hill 369), 93
- Childers v. Neeley (47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468), 289, 293, 336, 342, 346, 347, 349, 350
- Childs v. Clark (3 Barb. Ch. 52; 49 Am. Dec. 164), 233, 365
- Childs v. Gillespie (147 Pa. St. 173; 23 S. E. Rep. 312), 86
- Childs v. Hurd (32 W. Va. 66; 9 S. E. Rep. 362), 366, 370, 638, 639
- Childs v. Kansas City, etc., Co. (117 Mo. 414; 23 S. W. Rep. 373), 296, 297
- Chisholm v. Atlanta Gaslight Co. (57 Ga. 28), 682, 687, 710, 762
- Chisholm v. Halifax (29 Nov. Sco. 402), 532, 789
- Chister Emery Co. v. Lucas (112 Mass. 424), 76, 77
- Chetham v. Williamson (4 East. 469), 105
- Chouteau v. St. Louis Gaslight Co. (47 Mo. App. 326), 624
- Christy's Appeal (110 Pa. St. 538; 5 Atl. Rep. 205; 9 Morr. Min. Rep. 42), 300
- Chung Kee v. Davidson (102 Cal. 188; 36 Pac. Rep. 519), 342, 345

TABLE OF CASES.

(References are to pages.)

- Churchill v. Lammers (60 Mo. App. 244), 308
- Chynowitch v. Granby, etc., Co. (74 Mo. 173), 83
- Cincinnati v. Cincinnati Gaslight & Coke Co. (53 Ohio St. 278; 41 N. E. Rep. 239), 598
- Cincinnati, etc., Co. v. Bowling Green (57 Ohio St. 336; 49 N. E. Rep. 121), 428, 434, 577, 578, 579, 588, 597
- Cincinnati Gaslight, etc., Co. v. Avondale (43 Ohio St. 257; 1 N. E. Rep. 527, reversing 8 Ohio N. P. 88; 11 Wkly. L. Bull. 216; 13 Wkly. L. Bull. 467; 14 Wkly. L. Bull. 15), 425, 434, 443, 444, 463, 499
- Cincinnati, etc., Co. v. State (18 Ohio St. 237), 444, 622, 836
- Citizens' Gas, etc., Co. v. Elwood (114 Ind. 332; 16 S. E. Rep. 624; 20 Am. and Eng. Corp. Cas. 263), 488
- Citizens' Gaslight & Heating Co. v. O'Brien (15 Ill. App. 400, affirmed 118 Ill. 174), 736, 760
- Citizens' Gaslight & Heating Co. v. O'Brien (118 Ill. 174; 8 N. E. Rep. 310, affirming 115 Ill. App. 400), 736, 750, 751, 761, 792
- Citizens' Gaslight & Heating Co. v. O'Brien (19 Ill. App. 231), 736
- Citizens' Gaslight Co. v. Wakefield (161 Mass. 432; 37 N. E. Rep. 444), 566, 558
- Citizens' Ins. Co. v. McLaughlin (53 Pa. St. 485), 809, 818
- Citizens' Natural Gas Co. v. Shenango, etc., Co. (138 Pa. St. 22; 20 Atl. Rep. 947), 120
- Citizens' Water Co. v. Bridgeport, etc., Co. (55 Conn. 1; 10 Atl. Rep. 170), 480
- Citizens' Water Co.'s Charter (6 Pa. Dist. Rep. 80), 483
- City of Erie, Appeal of (91 Pa. St. 398), 450
- City of New York v. Hamilton Fire Ins. Co. (10 Bosw. 537), 813
- City of New York v. Brooklyn Fire Ins. Co. (41 Barb. 231), 823
- City of Philadelphia v. Collector (5 Wall. 720), 837
- City of Scranton v. Gilbert (16 W. N. C. (Pa.) 28), 839
- City Fire Ins. Co. v. Corlies (21 Wend. 367), 803
- City Water Co. v. State (88 Tex. 600; 32 S. W. Rep. 1033; 33 S. W. Rep. 259), 541
- City Water Co. v. State (33 S. W. Rep. (Tex.) 259), 527
- City Water Supply Co. v. Ottumwa (120 Fed. Rep. 309), 450
- Clark v. Brown (83 Cal. 181; 23 Pac. Rep. 289), 346
- Clark v. Jones (1 Denio 516), 199
- Clark v. Midland, etc., Co. (21 Mo. App. 58), 162
- Clark v. Ritter (59 Cal. 669), 342, 347
- Clark v. Rumsey (59 N. Y. App. Div. 435; 69 N. Y. Supp. 102; 52 N. Y. Supp. 417), 349
- Clarke v. Curtis (1 Gratt. 289), 366
- Clarksburg Electric Light Co. v. Clarksburg (47 W. Va. 739; 35 S. E. Rep. 994; 50 L. R. A. 142), 522, 534
- Clason v. Corley (5 Sandf. 447), 367
- Clavering v. Clavering (2 P. W. (N. S.) 388), 289
- Clavering v. Westley (3 P. W. (N. S.) 402), 277
- Clegg v. Earby Gas Co. ([1896] 1 Q. B. 592; 65 L. J. Q. B. 339), 587
- Clement v. Youngman (210 Pa. St. 341), 63, 80
- Clements v. Philadelphia Co. (184 Pa. St. 28; 38 Atl. Rep. 1090; 28 Pittsb. L. J. (N. S.) 344; 41 W. N. C. 321; 39 L. R. A. 532), 649

(References are to pages.)

- Clements v. Philadelphia Co.** (3 Super. Ct. 14; 39 W. N. C. 299, reversed 184 Pa. St. 28; 41 W. N. C. 321; 28 Pittsb. L. J. (N. S.) 344; 39 L. R. A. 532; 38 Atl. Rep. 1090), 392, 394, 408
- Cleminger v. Baden Gas Co.** (159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293), 68, 150, 167, 192, 193, 210, 214
- Cleveland, etc., R. R. Co. v. Closser** (126 Ind. 348; 26 N. E. Rep. 159; 9 L. R. A. 754; 22 Am. St. Rep. 593), 626
- Cleveland, etc., Co. v. Backus** (133 Ind. 513; 33 N. E. Rep. 421; 18 L. R. A. 729, affirmed 154 U. S. 439; 14 Sup. Ct. Rep. 1122), 837
- Cleveland, etc., Ry. Co. v. Connersville** (147 Ind. 277; 46 N. E. Rep. 579), 588
- Cleveland, etc., Ry. Co. v. Ballentine** (84 Fed. Rep. 935; 56 U. S. App. 266; 28 C. C. A. 572), 405, 408
- Cleveland v. Citizens' Gaslight Co.** (20 N. J. Eq. 201), 664, 667, 672, 674, 679
- Cleveland Gaslight & Coke Co. v. Cleveland** (71 Fed. Rep. 610; 35 Ohio L. Bull. 155), 421, 422, 428, 442
- Cleveling v. West End Iron Co.** (51 N. J. L. 34; 16 Atl. Rep. 184), 224, 245
- Clift v. Clift** (3 Pickle (Tenn.) 17; 9 S. W. Rep. 360), 288
- Clippens Oil Co. v. Edinburgh, etc.** (25 Rettie 370), 553
- Cline v. Kirkbinder** (12 Ohio C. C. Dec. 517; 22 Ohio Cir. Rep. 527), 668
- Clowes v. Staffordshire W. W. Co.** (L. R. 8 Ch. 125; 42 L. J. Ch. 107; 27 L. T. 521; 2 W. R. 32), 674
- Clowser v. Joplin Mining Co.** (4 Dill 469), 296
- Coal Co. v. Pearce** (153 Pa. St. 74; 25 Atl. Rep. 1026), 109
- Coaldale, etc., Co. v. Clark** (43 W. Va. 84; 27 S. E. Rep. 294), 272
- Coates v. Cheever** (1 Cow. 460), 287, 289, 294
- Coates v. Mayor** (7 Cow. 585), 420, 675
- Coatsville Gas Co. v. County of Chester** (97 Pa. St. 476), 832, 838
- Cochran v. Pew** (159 Pa. St. 184; 28 Atl. Rep. 219), 131, 183, 184, 187, 266
- Cochran v. Philadelphia, etc., Co.** (184 Pa. St. 565; 39 Atl. Rep. 296), 704
- Cochran v. Shenango, etc., Co.** (23 Pittsb. Leg. J. (N. S.) 82), 169
- Cochrane v. Justice Mining Co.** (26 Pac. Rep. (Colo.) 780), 314, 317
- Coe v. Hobby** (72 N. Y. 141), 172
- Coffin v. Davenport** (26 Ia. 515), 468
- Coffeyville, etc., Co. v. Citizens', etc., Co.** (55 Kan. 173; 40 Pac. Rep. 326), 513, 534
- Coffinbery v. Sun Oil Co.** (67 N. E. Rep. (Ohio) 1069), 146, 147, 166, 176, 191, 198, 203, 207, 218
- Colby v. Gadsden** (34 Beav. 416; 11 Jur. (N. S.) 760; 12 L. T. 197), 319
- Cole v. Pennoyer** (14 Ill. 158), 280
- Cole v. Taylor** (8 Pa. Super. Ct. Rep. 19), 161, 167, 228
- Coleman's Appeal** (1 Pearson 470), 296
- Coleman's Appeal** (62 Pa. St. 252), 301, 303
- Coleman v. Blewett** (43 Pa. St. 176), 296
- Colgan v. Forest Oil Co.** (30 Pittsb. L. J. (N. S.) 68), 107, 203

TABLE OF CASES.

(References are to pages.)

- Colgan v. Forest Oil Co.** (194 Pa. St. 234; 45 Atl. Rep. 119; 30 Pittsb. L. J. (N. S.) 68; 75 Am. St. Rep. 695, rev. 30 Pittsb. Leg. (N. S.) 213), 107, 115, 128, 129, 274
- Collier v. Cunningham** (2 Ind. App. 254; 28 N. E. Rep. 341), 247
- Collins v. Cincinnati, etc., Co.** (13 Ky. Rep. 670; 18 S. W. Rep. 11), 791
- Collins v. Hasbrouck** (56 N. Y. 157; 15 Am. Rep. 407), 246
- Collins v. Mechling** (1 Pa. Super. Ct. Rep. 594; 38 W. N. C. 235; 26 Pittsb. L. J. (N. S.) 459), 153, 155
- Colorado, etc., Co. v. Turek** (70 Fed. Rep. 294), 49, 197
- Colson v. Portland** (Fed. Cas. 3275), 451
- Columbia, etc., Co. v. American Fire Ins. Co.** (59 Mo. App. 204), 812, 821
- Columbia Conduit Co. v. Commonwealth** (90 Pa. St. 307), 53, 548, 553
- Columbian Oil Co. v. Blake** (13 Ind. App. 680; 42 N. E. Rep. 234), 32, 132, 267, 269, 282
- Columbus, etc., Co. v. Columbus** (50 Ohio St. 65; 33 N. E. Rep. 292; 19 L. R. A. 510), 542
- Columbus Water Co. v. Columbus** (48 Kan. 99; 28 Pac. Rep. 1097), 452
- Columbus Water Co. v. Columbus** (48 Kan. 378; 29 Pac. Rep. 762; 15 L. R. A. 354), 502
- Columbus Gaslight Co. v. Freeland** (12 Ohio St. 392), 651, 653, 667
- Columbus, etc., Co. v. Tucker** (48 Ohio St. 41; 26 N. E. Rep. 630), 654
- Colvin v. Weimer** (64 Minn. 37; 65 N. W. Rep. 1079), 359, 360
- Comegys v. Russell** (175 Pa. St. 166; 34 Atl. Rep. 657), 232, 236
- Commercial Bank v. London Gas Co.** (20 Up. Can. Q. B. 233), 576, 585
- Commercial, etc., Co. v. Tacoma** (17 Wash. 661; 50 Pac. Rep. 592), 522, 527, 541
- Commercial Gas Co. v. Scott** (L. R. 10 Q. B. 400; 25 Gas J. 889), 577, 587
- Commercial Ins. Co. v. Mehlman** (48 Ill. 313), 801
- Commercial Ins. Co. v. Robinson** (64 Ill. 265), 803
- Commercial Union Fire Ins. Co. v. Lister** (23 Gas J. 364), 826
- Commonwealth v. Lowell Gaslight Co.** (12 Allen 77), 390, 575, 618, 632
- Commonwealth v. McKibbin** (90 Ky. 384; 14 S. W. Rep. 372), 835
- Commonwealth v. Nashua, etc., R. R. Co.** (2 Gray 54), 514
- Commonwealth v. Old Colony, etc., R. R. Co.** (14 Gray 93), 514
- Commonwealth v. Philadelphia** (132 Pa. St. 288; 19 Atl. Rep. 136), 607, 608
- Commonwealth v. Russell** (172 Pa. St. 506), 658
- Commonwealth v. Sauter** (6 Kulp. 407), 397
- Commonwealth v. Shaw** (4 Allen 308; 81 Am. Dec. 706; Beale's Cas. 506), 843
- Commonwealth v. Steierling** (156 Pa. St. 400; 27 Atl. Rep. 297), 42
- Commonwealth v. Towanda Water Works** (15 Atl. Rep. (Pa.) 440), 539, 540
- Commonwealth v. Wentworth** (118 Mass. 441), 419
- Commonwealth v. Wilkes-Barre Gas Co.** (2 Kulp. (Pa.) 499), 576, 581
- Conant v. Smith** (1 Aiken 67), 298
- Conemaugh Gas Co. v. Jackson Farm Gas Co.** (186 Pa. St. 443; 40 Atl. Rep. 1000), 614

TABLE OF CASES.

xiv

(References are to pages.)

- Confers v. New York, etc., R. R. Co.** (146 Pa. St. 31; 23 Atl. Rep. 202), 770
- Conger v. National, etc., Co.** (165 Pa. St. 561; 31 Atl. Rep. 1038), 184
- Conner v. New Albany** (1 Blackf. 43), 513
- Conrad v. Morehead** (89 N. C. 31), 70, 190
- Conroy v. Chicago, etc., Co.** (96 Wis. 243; 70 N. W. Rep. 486; 38 L. R. A. 419), 406
- Conshohocken Gaslight Co., *In re*** (5 Pa. Co. Ct. Rep. 585), 525
- Consolidated Coal Co. v. Baker** (135 Ill. 545; 26 N. E. Rep. 651), 841
- Consolidated Gas Co. v. Crocker** (82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785), 685, 697, 706, 707, 710, 712, 723, 746, 748
- Consolidated Gas Co. v. Mitchell** (1 Dauph. Co. Rep. 71), 482
- Consolidated Coal Co. v. Peers** (59 Ill. App. 604), 257
- Consolidated Coal Co. v. Peers** (150 Ill. 344; 37 N. E. Rep. 937, affirming 39 Ill. App. 453), 75, 76, 79, 234, 245, 272
- Consolidated Coal Co. v. Savitz** (57 Ill. App. 659), 94
- Consolidated Coal Co. v. Seninger** (79 Ill. App. 456, affirmed 179 Ill. 370; 53 N. E. Rep. 733), 693, 753
- Consumers' Gas Co. v. Toronto** (26 Ont. Rep. 722), 833
- Consumers' Gas Co. v. Toronto** (27 Can. S. C. 453, affirmed 23 Ont. App. Rep. 551), 832
- Consumers' Gas Trust Co. v. Corbaley** (14 Ind. App. 549; 43 N. E. Rep. 237), 707, 714, 723, 756
- Consumers' Gas Trust Co. v. Harless** (131 Ind. 446; 29 N. E. Rep. 1062), 388, 389, 390
- Consumers', etc., Co. v. Huntsinger** (14 Ind. App. 156; 42 N. E. Rep. 640), 389, 391, 513, 517, 549, 551, 552, 553, 554
- Consumers' Gas Trust Co. v. Perrego** (144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146), 714, 715, 721, 723, 725, 742, 761
- Consumers' Oil Co. v. Nunnemaker** (142 Ind. 560; 41 N. E. Rep. 1048; 51 Am. St. Rep. 193), 503
- Conyers v. Kirk** (78 Ga. 480; 3 S. E. Rep. 442), 446, 456, 462
- Cook v. Anderson** (85 Ala. 99; 4 So. Rep. 713), 778
- Cook v. Andrews** (36 Ohio St. 174), 130, 162
- Cook v. Harris** (1 Led. Raym. 367), 238
- Cooke v. Forbes** (L. R. 5 Eq. 166; 37 L. J. Ch. 178; 17 L. T. (N. S.) 371), 663, 674
- Cooney v. Hayes** (40 Vt. 478), 247
- Copp v. German-American Ins. Co.** (51 Wis. 637; 8 N. W. Rep. 127, 616), 800
- Corbet v. Oil City Fuel Supply Co.** (5 Pa. Super. Ct. 19; 40 W. N. C. 480), 612
- Corbin v. Philadelphia** (195 Pa. St. 461; 45 Atl. Rep. 1070; 49 L. R. A. 715), 780
- Corcoran v. Milwaukee, etc., Co.** (81 Wis. 191; 51 N. W. Rep. 323), 793
- Core v. N. Y., etc., Co.** (43 S. E. Rep. (W. Va.) 128), 107, 108, 114, 123, 190, 217
- Cornell v. Lamb** (2 Cow. 652), 251
- Cornish v. Farm, etc., Ins. Co.** (74 N. Y. 295), 809
- Cosgrove v. Troesch** (62 App. Div. (N. Y.) 123; 70 N. Y. Supp. 764), 634, 636
- Cosmos, etc., Co. v. Gray Eagle Oil Co.** (104 Fed. Rep. 20), 335
- Costigan v. Hastler** (2 Sch. & Lef. 160), 367

TABLE OF CASES.

(References are to pages.)

- Cosulich v. Standard Oil Co. (122 N. Y. 118; 25 N. E. Rep. 259, revising 55 N. Y. Super. Ct. Rep. 384), 701, 702, 779
- Cotling v. Kansas City, etc., Co. (183 U. S. 85; 22 Sup. Ct. Rep. 30), 618
- Couch v. Rochester, etc., Ins. Co. (25 Hun 469), 801, 822
- Couch v. Steel (3 E. & B. 402), 587
- Cogle v. National, etc., Co. (165 Pa. St. 561; 30 Atl. Rep. 1038), 265
- Coulter v. Conemaugh Co. (30 Pittsb. L. J. (N. S.) 281), 187, 269
- Covington v. Commonwealth (19 Ky. L. Rep. 105; 39 S. W. Rep. 836; 173 U. S. 231), 835
- Covington, etc., Co. v. Sandford (164 U. S. 578), 430
- Covington Gaslight Co. v. City of Covington (84 Ky. 94), 832
- Cowan v. Radford Iron Co. (83 Va. 547; 3 S. E. Rep. 120), 71, 165, 217
- Cowell v. Colorado Springs (100 U. S. 55), 390
- Cox v. Bishop (8 DeG. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. (N. S.) 499; 29 L. T. 44; 5 W. R. 437), 227
- Coy v. City Council (17 Ia. 1), 468
- Coy v. Indianapolis Gas Co. (146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771), 577, 578, 581, 589, 590
- Craig v. Wells (11 N. Y. 315), 328
- Crane v. Columbus Construction Co. (73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233), 713, 717, 719
- Craw v. Wilson (22 Nev. 385; 40 Pac. Rep. 1076), 310
- Crawford v. Bellvere, etc., Gas Co. (183 Pa. St. 227; 38 Atl. Rep. 595), 94, 261, 274
- Crawford v. Oman, etc., Co. (12 S. E. Rep. (S. C.) 929), 259
- Crawford v. Ritchey (43 W. Va. 252; 27 S. E. Rep. 220), 68, 148, 167, 217
- Crawford v. Witherbee (77 Wis. 419; 46 N. W. Rep. 545), 109
- Crawfordsville v. Braden (130 Ind. 149; 28 N. E. Rep. 849; 14 L. R. A. 268; 30 Am. St. Rep. 214), 558, 560
- Crawshay v. Maule (1 Swanst. 521; 1 Wilc. 181), 338
- Creel v. Charleston, etc., Gas Co. (51 W. Va. 129; 41 S. E. Rep. 174), 740, 752
- Crescent Steel Co. v. Equitable Gas Co. (23 Pittsb. Leg. J. (N. S.) 316), 577, 579, 591, 592, 597
- Creveling v. De Hart (54 N. J. L. 338; 23 Atl. Rep. 611), 170, 241, 245
- Crescent City Gaslight Co. v. New Orleans Gaslight Co. (27 La. Ann. 138), 480, 493, 502
- Creston W. W. Co. v. Creston (101 Ia. 687; 70 N. W. Rep. 739), 432, 450, 470, 474
- Croft, etc., Gas Co. v. Pryor (31 Gas. J. 386), 788
- Crooke v. Flatbush W. W. Co. (29 Hun 245), 548
- Cromwell v. Stephens (2 Daly 15), 612
- Crosby v. Montgomery (108 Ala. 498; 18 So. Rep. 723), 588, 603
- Crossley v. Lightowler (L. R. 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. (N. S.) 638; 15 W. R. 801), 674
- Crouch v. Puryear (1 Rand. 258), 288
- Crouse v. Holdman (19 Ind. 30), 280
- Crowder v. Sullivan (128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647), 446, 450, 454, 488, 505

TABLE OF CASES.

xlvii

(References are to pages.)

- Crumley v. Watauga Water Co.** (99 Tenn. 420; 41 S. W. Rep. 1058), 577, 585
- Cryan v. Ridelsperger** (7 Pa. Co. Ct. Rep. 473), 167, 202, 207
- Crystal Palace Gas Co. v. Idris** (82 L. T. 200; 64 J. P. 452), 473
- Culbertson v. Fulton** (127 Ill. 30; 18 N. E. Rep. 781), 450, 451
- Cullius v. Flagstaff, etc., Co.** (2 Utah 219), 358
- Cumming v. Jrescott** (2 Y. & C. Exch. 488), 332
- Cunningham v. Knight** (1 Barb. 399), 329
- Current v. Fulton** (10 Ind. App. 617; 38 N. E. Rep. 119), 615
- D**
- Daglish, Ex parte, In re Wilde** (L. R. 8 Ch. App. 1072), 627
- Dalzell v. Findlay** (5 Ohio Cir. Ct. 435; 3 Ohio Cir. Dec. 214, affirmed 27 Wkly. L. Bull. 128), 597
- Damainville v. Mann** (32 N. Y. 197), 238
- Daniels v. Detwiler** (14 Mont. Co. L. Rep. 58; 15 Lanc. L. Rev. 165), 634, 635
- Danville v. Danville Water Co.** (178 Ill. 299; 53 N. E. Rep. 118; 180 Ill. 235; 54 N. E. Rep. 224; 186 Ill. 326; 57 N. E. Rep. 1129), 438
- Danville Water Co. v. Danville** (180 U. S. 619; 21 St. Ct. 505, affirming 186 Ill. 326; 57 N. E. Rep. 1129), 439
- Dark v. Johnston** (55 Pa. St. 164), 79, 81, 82
- Darling v. Crowell** (6 N. H. 421), 328
- Darlington v. Allegheny** (28 Pittsb. L. J. (N. S.) 381), 393
- Dartmouth College v. Clough** (8 N. H. 22), 246
- Davenport Gaslight & Coke Co. v. Davenport** (13 Ia. 229; 15 Ia. 6), 446, 458, 472, 473
- Davenport, etc., Ry. Co. v. Davenport Gaslight Co.** (43 Ia. 301), 546
- Davenport v. Kelly** (7 Ia. 102), 488
- Davenport v. Kleinschmidt** (6 Mont. 502; 13 Pac. Rep. 249), 498, 508
- Davenport v. Richmond** (81 Va. 636 (gunpowder).), 418
- Davens v. Merchants', etc., Ins. Co.** (7 La. Ann. 344), 811, 816
- Davidson v. Jennings** (27 Colo. 187; 60 Pac. Rep. 354; 48 L. R. A. 340), 353
- Davis v. Clark** (2 Mont. 310), 323
- Davis v. Jefferson Gas Co.** (147 Pa. St. 130; 23 Atl. Rep. 218), 396
- Davis v. Mayor** (14 N. Y. 506; 67 Am. Dec. 186), 488
- Davis v. Moss** (38 Pa. 346), 180, 194, 198, 641
- Davis v. Shephard** (L. R. 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122), 318
- Davis v. Smith** (130 Mass. 113), 512
- Dawson v. Kirby** (6 Pa. Dist. Rep. 13; 27 Pittsb. L. J. (N. S.) 234), 633
- Dawson v. McFaddin** (22 Neb. 131; 34 N. W. Rep. 338), 315
- Dawson v. Water Works Co.** (106 Ga. 696; 32 S. E. Rep. 907), 451
- Dayton v. Quigley** (37 N. J. Eq. 77), 605, 607
- Decatur Gaslight & Coke Co. v. Howell** (92 Ill. 19), 675
- Decatur Gaslight & Coke Co. v. Decatur** (120 Ill. 67; 11 N. E. Rep. 406, affirming 24 Ill. App. 544), 598
- Dechert v. Municipal, etc., Co.** (57 N. Y. Supp. 225), 756

(References are to pages.)

- Decker v. Howell (42 Cal. 636), 339, 348
- Deckert v. Municipal, etc., Co. (9 N. Y. App. Div. 573; 41 N. Y. Supp. 692), 681
- Deere v. Guest (1 My. & C. 516; 6 L. J. Ch. 69), 537
- Deering, *In re* (93 N. Y. 361), 542
- Defiance Water Co. v. Olinger (54 Ohio St. 532; 44 N. E. Rep. 238; 32 L. R. A. 736; 35 Ohio L. J. 323, 350), 685, 731, 736
- Delaware, etc., Co. v. Sanderson 109 Pa. St. 583), 62, 76, 272, 839
- Delaware, etc., Co. v. Von Storch (196 Pa. St. 102; 46 Atl. Rep. 375), 840
- DeMattos v. Gibson (4 DeG. & J. 276), 620
- Den v. Post (25 N. J. L. 285), 199
- Denning v. Terminal Ry. (49 N. Y. App. Div. 493; 63 N. Y. Supp. 615), 754
- Denniston v. Philadelphia Co. (1 Super. (Pa.) Ct. 599; 38 W. N. C. 332; 27 Pittsb. L. J. (N. S.) 14), 393, 730
- Denniston v. Philadelphia Co. (161 Pa. St. 41; 28 Atl. Rep. 1007), 393
- Densmore Oil Co. v. Densmore (64 Pa. St. 43), 312
- Denver v. Hubbard (68 Pac. Rep. (Colo. Ap.) 993), 454
- Denys v. Shuckburgh (4 Y. & C. Exch. 42; 5 Jur. 21), 297, 301
- Desloge v. Pearce (38 Mo. 588), 79, 82, 83, 640
- Des Moines v. Hall (24 Ia. 234), 333
- Des Moines Water Co., *In re* (48 Ia. 324), 833
- Des Moines Gas Co. v. Des Moines (44 Ia. 505), 480, 498, 500
- Des Moines St. Ry. Co. v. Des Moines (73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602), 480, 489, 490, 508
- Des Moines v. Des Moines W. W. Co. (95 Ia. 348; 64 N. W. Rep. 269), 433, 463, 464, 465, 612
- Detlor v. Holland (57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266), 76, 83, 103, 113, 161, 173, 332
- Detroit v. Detroit, etc., Co. (184 U. S. 368; 22 Sup. Ct. Rep. 410), 420
- Detroit v. Hosmer (79 Mich. 384; 44 N. W. Rep. 622), 455
- Detroit Gas Co. v. Moreton, etc., Co. (111 Mich. 401; 69 N. W. Rep. 659), 591, 627
- Detroit v. Mutual Gaslight Co. (43 Mich. 594; 5 N. W. Rep. 1039), 536
- Detroit Pharmacal Co. v. Burt (124 Mich. 220; 82 N. W. Rep. 893), 171, 242, 245
- Detroit Citizens' St. Ry. Co. v. Detroit Ry. (171 U. S. 48; 18 Sup. Ct. Rep. 732, affirming 110 Mich. 384; 68 N. W. Rep. 304), 489, 563, 564
- Devine v. Taylor (12 Ohio Cir. Ct. Rep. 723; 4 Ohio Cir. Ct. Dec. 248; 1 Ohio Dec. 153), 64, 355, 360, 361
- Dewey, A. A., *In re* (9 Copp. L. D. 51), 55
- Dewey v. Rogers (2 Law. Dic. 707), 55
- D'Eyncourt v. Gregory (L. R. 3 Eq. 382), 638
- Diamond Plate Glass Co. v. Curless (22 Ind. App. 346; 52 N. E. Rep. 782), 70, 264
- Diamond Plate Glass Co. v. Echelbarger (24 Ind. App. 124; 55 N. E. Rep. 233), 70
- Diamond Plate Glass Co. v. Tennell (22 Ind. App. 132; 52 N. E. Rep. 168), 95, 126, 259, 276
- Dicken v. Harmer (1 Drew & Sm. 284; 39 L. J. Ch. 778; 2 L. T. 276), 294

TABLE OF CASES.

xlix

(References are to pages.)

- Dickenson v. Bolyer** (55 Cal. 285), 355, 356
- Dickinson v. Doodds** (L. R. 2 Ch. Div. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 W. R. 594), 314
- Dickinson v. Valpy** (10 B. & C. 128; 5 M. & Ry. 126; 8 L. J. (O. S.) K. B. 51), 345, 348
- Diehl v. Adams County, etc., Ins. Co.** (58 Pa. St. 443), 801
- Dietz v. Mission Transfer Co.** (95 Cal. 92; 30 Pac. Rep. 380), 94, 332, 645
- Dietz v. Mission Transfer Co.** (25 Pac. Rep. (Cal.) 423), 325, 329, 332
- Dillon v. Acme Oil Co.** (49 Hun 565), 661, 662
- Dillon v. Washington Gaslight Co.** (1 MacArthur (D. C.) 626), 780
- Disher v. Disher** (45 Neb. 100; 63 N. W. Rep. 368), 292
- District of Columbia v. Washington Gaslight Co.** (20 D. C. 39), 481, 517, 427
- District of Columbia v. Washington Gaslight Co.** (9 Mackey 39; 161 U. S. 316), 755
- Dittmer v. Germania Ins. Co.** (23 La. Ann. 458; 8 Am. Rep. 600), 809
- Dively v. Cedar Falls** (27 Ia. 227), 450
- Dixon v. Entriiken** (6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. Rep. 414), 470, 564, 565
- Dobbins v. Los Angeles** (72 Pac. Rep. (Cal.) 970), 419
- Dobschuetz v. Holliday** (82 Ill. 371), 641
- Doe d. Hanley v. Wood** (2 Barn. & Ald. 724), 105
- Doe v. Jepson** (3 B. & Ad. 402; 1 L. J. K. B. 154), 199
- Doe v. Martin** (4 B. & Ad. 785), 318
- Doe v. Masters** (2 B. & C. 490), 199
- Donahue v. Kelly** (181 Pa. St. 93; 37 Atl. Rep. 186; 59 Am. St. Rep. 632), 779
- Donahoe v. Rich** (2 Ind. App. 540; 28 N. E. Rep. 1001), 172, 242
- Donahue v. Wabash, etc., Co.** (83 Pa. St. 560), 780
- Dooley v. Watson** (1 Gray 414), 124
- Dorr v. Danville Gaslight Co.** (18 Hun 274), 664
- Double v. Union Heat, etc., Co.** (172 Pa. St. 388; 37 W. N. C. 389; 33 Atl. Rep. 694), 154
- Doubleday v. Muskett** (4 Moo. & P. 750; 7 Bing. 110; 9 L. J. (O. S.) C. P. 35), 345
- Douglass v. Placerville** (18 Cal. 644), 563
- Dougherty v. Creary** (30 Cal. 290; 89 Am. Dec. 116), 347
- Douthett v. Gibson** (11 Pa. Sup. Ct. Rep. 540), 267
- Dover Gaslight Co. v. Dover** (7 DeG. M. & G. 545; 4 Gas J. 129, 176; 1 Jur. (N. S.) 812), 391
- Dover v. Main Water Co.** (90 Me. 180; 38 Atl. Rep. 101), 832
- Dow v. Winnepesaukee Gas, etc., Co.** (69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569), 706, 712, 729
- Dowe v. Faneuil Hall Ins. Co.** (127 Mass. 346), 805
- Dower v. Richards** (151 U. S. 658; 14 Sup. Ct. Rep. 452), 335
- Downing v. State** (66 Ga. 160), 786
- Drake v. Laco** (157 Pa. St. 17; 27 Atl. Rep. 538), 217, 277
- Dresser v. Transporting Co.** (8 W. Va. 553), 278
- Driscoll v. Public Board of Works** (14 T. L. Rep. 99; 62 J. P. 40), 545
- DuBois v. DuBois, etc., Co.** (176 Pa. St. 430; 35 Atl. Rep. 248; 38 W. N. C. 417; 34 L. R. A. 92), 447, 460
- Dubuque v. Benson** (23 Ia. 248), 334

TABLE OF CASES.

(References are to pages.)

- Dudley v. Warde (Amb. 113), 642, 646
- Duff's Appeal (21 W. N. C. 490), 251, 272, 370, 371
- Duffield v. Hue (129 Pa. St. 94; 18 Atl. Rep. 566), 73, 95, 140, 192
- Duffield v. Hue (136 Pa. St. 602; 20 Atl. Rep. 526; 129 Pa. St. 94; 18 Atl. Rep. 566), 106, 120, 126
- Duffield v. Michaels (97 Fed. Rep. 825), 105
- Duffield v. Michaels (102 Fed. Rep. 820; 42 C. C. A. 649; 97 Fed. Rep. 825), 150, 192, 195, 196, 214
- Duffield v. Russell (19 Ohio Cir. Ct. Rep. 266; 10 Ohio C. D. 472), 113, 151
- Duffield v. Rosenzweig (144 Pa. St. 520; 23 Atl. Rep. 4; 150 Pa. St. 543; 24 Atl. Rep. 705), 106, 120, 124, 125
- Duffus v. Howard Furnace Co. (8 N. Y. App. Div. 567; 40 N. Y. Supp. 925), 631, 636
- Duke v. Hague (107 Pa. St. 66), 72, 75, 81
- Dunat's Est., *In re* (29 Pittsb. L. J. 105), 76
- Duncan v. Sun Fire Ins. Co. (6 Wend. 488), 801, 802
- Dunlap Steamboat v. Reliance (2 Fed. Rep. 249), 703
- Dunham v. Kirkpatrick (101 Pa. St. 43), 31, 329, 331
- Dunham v. Lovewek (158 Pa. St. 197; 27 Atl. Rep. 990), 342
- Durant Mining Co. v. Percy, etc., Co. (93 Fed. Rep. 166), 49
- Duryea v. Burt (28 Cal. 569), 350, 351
- Dyke v. National Transit Co. (22 N. Y. App. Div. 360; 49 N. Y. Supp. 180), 49, 125
- E
- Eads v. Retherford (114 Ind. 273; 16 N. E. Rep. 587), 308
- Eads v. Williams (24 L. J. (N. S.) Ch. 531; 4 DeG. M. & G. 674; 11 Jur. (N. S.) 193; 3 W. R. 98; 24 L. T. 162), 319
- Eaman v. Bashford (37 Pac. Rep. (Ariz.) 24), 354
- Earl of Mansfield v. Blackburne (3 Scott (N. S.) 820; 6 Bing. N. C. 427), 647
- Early v. Friend (16 Gratt. 21; 78 Am. Dec. 649), 303
- East Jersey Co. v. Wright (32 N. J. Eq. 248), 63, 79, 82, 105, 106, 163
- East River Gaslight Co. v. Donnelly (25 Hun 614), 455
- East St. Louis v. East St. Louis Gas, etc., Co. (98 Ill. 415; 38 Am. Rep. 97), 427, 450, 464
- East Sugar Loaf Coal Co. v. Wilbur (5 Pa. Dist. Rep. 202), 639
- Eaton v. Allegany Gas Co. (122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61), 68, 152, 161, 189, 190
- Eaton v. Wilcox (42 Hun 61), 99, 136, 142
- Eaves v. Estes (10 Kan. 314), 631
- Eclipse Oil Co. v. South Penn. Oil Co. (47 W. Va. 84; 34 S. E. Rep. 923), 84, 85, 92
- Economic Fuel Gas Co. v. Myers (168 Ill. 139; 49 N. E. Rep. 66, affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276), 754
- Edgeware Highway Board v. Harrow District Gas Co. (L. R. 10 Q. B. 92; 44 L. J. Q. B. 1; 31 L. T. (N. S.) 402; 23 W. R. 90), 543
- Edison Electric, etc., Co. v. Jacobs (8 Kulp. 120), 454
- Edmonds v. Mounsey (15 Ind App. 399; 44 N. E. Rep. 196), 112, 224, 231, 238, 239, 259, 267, 270, 309
- Edwards v. Allouez Mining Co. (38 Mich. 46), 654

TABLE OF CASES.

li

(References are to pages.)

- Edwards v. Iola Gas Co. (65 Kan. —; 69 Pac. Rep. 350), 114, 176, 210, 217, 218, 219
- Edwards v. McClurg (39 Ohio St. 41), 77
- Edwards v. Woodbury (1 McCray 429; 3 Feu. Rep. 14), 366
- Edwards County v. Jennings (89 Tex. 618; 35 S. W. Rep. 1053, affirming 33 S. W. Rep. 585), 498
- Effinger v. Hall (81 Va. 94), 292
- Elder v. Lykens Valley Coal Co. (157 Pa. St. 490; 27 Atl. Rep. 545), 654
- Eldredge v. Bell (64 Ia. 125; 19 N. W. Rep. 879), 247
- Electric City, etc., Co. v. West Bridge, etc., Co. (187 Pa. St. 500; 41 Atl. Rep. 458), 109
- Eley's Appeal (103 Pa. St. 300), 287, 290
- Elias v. Snowden Slate Co. (4 App. Cas. 455; 48 L. J. Ch. 203; 26 W. R. 869; 38 L. T. 871; 8 Ch. Div. 521; 46 L. J. Ch. 806; 43 L. J.), 287, 371, 372, 374, 376
- Elk Fork Oil & Gas Co. v. Jennings (84 Fed. Rep. 839), 68, 83, 113, 114, 120, 147, 150, 192, 201, 205
- Elkins v. McKean (79 Pa. St. 493), 785, 786
- Elliott v. Bishop (24 L. J. Exch. p. 39; 42 L. J. Exch. p. 229; 10 Exch. 496), 638
- Ellis v. London Gaslight Co. (32 Gas J. 849), 620, 712, 762
- Ellis v. Sheffield Gas, etc., Co. (2 El. & B. 757; 18 Jur. 146), 788
- Ellinwood v. Reedsburg (91 Wis. 131; 64 N. W. Rep. 885), 561
- Elmhurst v. Spencer (2 Mac. N. & G. 45), 674
- Elmira Gaslight Co. v. Elmira (2 Alb. L. Jr. 392), 464, 498
- Elms v. Randall (4 Dana 519), 246
- Elyria Gas, etc., Co. v. Elyria (57 Ohio St. 374; 49 N. E. Rep. 335, reversing 14 Ohio C. C. Rep. 219; 7 Ohio Dec. 527; 38 Wkly L. Bull. 200; 39 Wkly. L. Bull. 139), 566
- Emerine v. Steel (8 Ohio C. Ct. Rep. 381; 4 Ohio C. Dec. 92), 109
- Emerson v. Babcock (66 Ia. 257; 55 Am. Rep. 273), 514
- Emerson v. Commonwealth (108 Pa. St. 111; 15 W. N. C. 425; 42 Leg. Int. 81), 52, 491, 501, 529
- Emerson v. Lowell (3 Allen 410; 6 Allen 146; 83 Am. Dec. 621), 682, 715, 716, 743, 757, 758, 759
- Emerson v. Lowell Gaslight Co. (6 Allen 146; 83 Am. Dec. 621; 3 Allen 410), 760, 761
- Emery v. Ledequ (6 Tex. Civ. App. 719; 72 S. W. Rep. 602), 72
- Empire Transportation Co. v. Wamsetta, etc., Co. (63 Pa. St. 14), 404
- Engel v. Fitch (L. R. 3 Q. B. 314; 9 B. J. S. 85; 37 L. J. Q. B. 145; 18 L. T. 318; 16 W. R. 785), 320
- Engleberth v. Troxell (40 Neb. 195; 58 N. W. Rep. 852), 280
- Enterprise Oil & Gas Co. v. National Transit Co. (172 Pa. St. 421; 26 Pittsb. L. J. (N. S.) 314; 37 W. N. C. 473; 33 Atl. Rep. 687), 56, 297, 301, 304, 388
- Epping v. Columbus (43 S. E. Rep. (Ga.) 803), 451
- Erie Mining & Natural Gas Co. v. Gas Fuel Co. (15 W. N. C. 399), 491
- Ernest v. New Orleans W. W. Co. (39 La. Ann. 550), 619
- Erving v. New York City (131 N. Y. 133; 29 N. E. Rep. 1101, affirming 16 N. Y. Supp. 612), 456
- Erskine v. Forest Oil Co. (80 Fed. Rep. 583), 119, 120, 140, 326, 327
- Ervin v. Masterman (16 Ohio Cir. Ct. Rep. 62; 8 Ohio Dec. 516), 349, 350

TABLE OF CASES.

(References are to pages.)

- Esberg-Trust Cigar Co. v. Portland (34 Ore. 282; 55 Pac. Rep. 961), 722
- Etowah Mining Co. v. Wills Valley, etc., Co. (121 Ala. 672; 25 So. Rep. 720), 110
- Eufaula Water Co. v. Addystone Water Co. (89 Ala. 522; 8 So. Rep. 25), 363
- Eureka Light-Ice Co. v. Eureka (5 Kan. App. 669; 48 Pac. Rep. 935), 501
- Evans v. Consumers' Gas Trust Co. (29 N. E. Rep. (Ind.) 398; 31 L. R. A. 673), 257, 259
- Evans v. Grand Rapids, etc., Ry. (68 Mich. 602; 36 N. W. Rep. 687), 284
- Evans v. Haefner (29 Mo. 141), 333
- Evans v. Hoggatt (9 Kan. App. 540; 59 Pac. Rep. 381), 777
- Evans v. Keystone Gas Co. (148 N. Y. 112; 42 N. E. Rep. 513; 30 L. R. A. 651; 51 Am. St. Rep. 681, affirming 72 Hun 503; 25 N. Y. Supp. 191; 28 Chic. L. News 160), 729, 766, 761
- Everett v. London Assurance Co., 804
- F
- Footway, Mitcham Gas Co. v. Wimbledon Local Board (30 Gas J. 600), 391
- Forbes v. Gracey (94 U. S. 762), 42, 840
- Ford v. Brooklyn Gaslight Co. (3 Hun 621), 601, 602
- Ford v. Buchanan (111 Pa. St. 31; 2 Atl. Rep. 339), 52
- Ford v. Cobb (20 N. Y. 344), 631
- Forney v. Ward (62 S. W. Rep. (Tex. Civ. App.) 108), 113, 208, 216
- Forst v. Belmont (6 Allen 152), 563
- Fort Orange Oil Co. v. Wichman (17 Ohio Cir. Ct. Rep. 57; 9 Ohio Cir. Dec. 650), 99, 253
- Forty Fort v. Forty Fort Water Co. (9 Kulp. (Pa.) 241), 467
- Fosdick v. Schall (99 U. S. 235), 631
- Foss v. Harbottle (2 Hare 489), 311
- Foster v. Cape May (60 N. J. L. 78; 36 Atl. Rep. 1089), 476
- Foster v. Elk Fork, etc., Co. (90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560), 48, 68, 84, 124, 147
- Foster v. Findlay (5 Ohio Cir. Ct. 455; 3 Ohio Cir. Dec. 224), 443, 570
- Foster v. Philadelphia Gas Works Trustees (12 Phila. 511), 620, 625
- Foster v. Runk (109 Pa. St. 291), 329
- Foster v. Weaver (118 Pa. St. 42; 12 Atl. Rep. 313), 292, 305
- Fowler v. Brooklyn Gaslight Co. (17 Gas J. 908), 602
- Fowler v. F. C. Austin Mfg. Co. (5 Ind. App. 489; 32 N. E. Rep. 596), 468
- Fox v. Frith (10 M. & W. 131; Car. & M. 502; 11 L. J. Exch. 336), 346
- Fraim v. National Fire Ins. Co. (170 Pa. St. 151; 37 W. N. C. 39; 32 Atl. Rep. 613), 810, 817
- Francoeur v. Newhouse (43 Fed. Rep. 236), 335
- Frank v. Maguire (42 Pa. St. 82), 171, 240, 245
- Franklin Coal Co. v. McMillan (49 Md. 549), 49, 289
- Franklin Co. v. Coal Co. (43 Kan. 518; 23 Pac. Rep. 630), 74
- Franklin Land Co. v. Wea Gas & Coal Co. (43 Kan. 518; 23 Pac. Rep. 630), 284, 286

TABLE OF CASES.

lii

(References are to pages.)

- Frankfort v. Capitol City, etc., Co. 16 Ky. L. Rep. 780; 29 S. W. Rep. 855), 571
- Fratt v. Whittier (58 Cal. 126; 41 Am. Rep. 251), 635
- Freeport Borough v. Enterprise Natural Gas Co. (18 Pa. Super. Ct. 73), 460, 528, 578, 600
- Freeport Water Co. v. Freeport (186 Ill. 179; 57 N. E. Rep. 862), 438
- Freeport Water Co. v. Freeport City (180 U. S. 587; 21 S. Ct. 493, affirming 186 Ill. 179; 57 N. E. Rep. 862), 421, 439
- Freeport W. W. Co. v. Pragen (3 Pa. Ct. Rep. 371), 491
- Freeman v. Freeman (43 N. Y. 34; 3 Am. Rep. 657), 315
- Freeman v. Memenway (75 Mo. App. 611), 339
- Freer v. Stotenbur (2 Keyes 467; 2 Abb. Dec. 189, reversing 36 Barb. 641), 285
- French v. Burlington (42 Ia. 614), 450
- French v. Macale (2 Dru. & W. 274), 124
- Friburk v. Standard Oil Co. (66 Minn. 277; 68 N. W. Rep. 1090), 664, 665, 666
- Friedlander v. Rider (30 Neb. 783; 47 N. W. Rep. 83), 639
- Friend v. Mallory (52 W. Va. —; 43 S. E. Rep. 114), 192, 194, 195, 202, 277
- Friend v. Porter (50 Mo. App. 89), 333
- Frothingham v. Benson (20 Misc. 132; 44 N. Y. Supp. 879), 625
- Frye v. Bath Gas, etc., Co. (94 Me. 17; 46 Atl. Rep. 804), 791
- Fuchs v. St. Louis (133 Mo. 168; 31 S. W. Rep. 115; 34 S. W. Rep. 508; 34 L. R. A. 118), 698, 777
- Fuher v. Buckeye Supply Co. (5 Ohio C. Pl. 187; 7 Ohio N. P. 420), 380
- Fulmer's Appeal (128 Pa. St. 24; 18 Atl. Rep. 493), 296, 301
- Fulton v. Stuart (2 Ohio 215), 246
- Funk v. Brigaldi (4 Daly 359), 633
- Funk v. Haldeman (53 Pa. St. 229), 32, 33, 72, 80, 81, 82, 83, 97, 105, 106, 330
- Fisher v. Baden Gas Co. (138 Pa. St. 301; 22 Atl. Rep. 29), 392
- Fisher v. Dixon (12 Cl. & F. 312), 642, 646
- Fisher v. Dunning (53 Mo. App. 548), 191
- Fisher v. Guffey (193 Pa. St. 393; 44 Atl. Rep. 459), 244
- Fisher v. Milliken (8 Pa. St. 111), 226, 245
- Fisher v. Rochester (6 Lans. 225), 333
- Fitchburgh, etc., Corp. v. Melven (15 Mass. 268), 366
- Flack, *In re* ([1900] 2 Q. B. 32), 610
- Flagstaff, etc., Co. v. Cullins (104 U. S. 176), 358
- Fleming v. Montgomery Light Co. (100 Ala. 657; 13 So. Rep. 618), 627, 686
- Fleming Oil & Gas Co. v. South Penn. Oil Co. (37 W. Va. 645; 17 S. E. Rep. 203), 113, 135, 208, 216
- Fletcher v. Rylands (L. R. 1 Exch.), 683
- Flick v. Bell (42 Pac. Rep. (Cal.) 813), 394
- Flint v. Gloucester Gaslight Co. (3 Allen 343; 9 Allen 552), 692, 708, 733, 739, 754
- Floyd, *In re* ([1897] 1 Ch. 633; 66 L. J. Ch. 350; 76 L. T. 251; 45 W. R. 435), 606
- Flory v. Hellero (1 Monaghan (Pa.) 478), 839
- Flureau v. Thornhill (2 W. Bl. 1078), 320

(References are to pages.)

- Flynn v. White Breast Coal Co. (92 Ia. 738; 32 N. W. Rep. 471), 87, 91, 258
- Fogarty v. Junction City, etc., Co. 50 Kan. 478; 31 Pac. Rep. 1052; 18 L. R. A. 756), 663
- Foland v. Frankton (142 Ind. 546; 41 N. E. Rep. 1031), 454, 468
- Foley v. Fletcher (3 H. & N. 779; 2 L. J. Exch. 100; 5 Jur. (N. S.) 342; 7 W. R. 141; 33 L. T. 11), 272
- Folkstone v. Downing (54 Gas J. 313), 547
- Fellwood v. Pearson (23 Gas J. 248), 759
- Folsom v. Cragen (11 Colo. 205; 17 Pac. Rep. 515), 354, 361
- Fonda v. Sage (46 Barb. 109), 199
- Fond du Lac Water Co. v. Fond du Lac (82 Wis. 322; 52 N. W. Rep. 439; 16 L. R. A. 581), 834
- Foot v. Fire Department (5 Hill 99 [gunpowder]), 418
- Fennell v. Guffey (139 Pa. St. 341; 20 Atl. Rep. 1048; 155 Pa. St. 38; 29 Atl. Rep. 785), 109, 111, 232, 238
- Ferens v. O'Brien (11 Q. B. Div. 21; 15 Cox C. C. 332), 843
- Fergus Falls Water Co. v. Fergus Falls (65 Fed. Rep. 586), 489, 508
- Ferguson v. Boston Co. (170 Mass. 182; 49 N. E. Rep. 115), 708, 728, 766
- Ferguson v. Metropolitan Gaslight Co. (38 N. Y. Supr. 185), 577, 587, 618
- Ferguson v. Wilson (L. R. 2 Ch. App. 77; 15 W. R. 27), 352
- Fernandez v. Burleson (110 Cal. 164; 42 Pac. Rep. 566), 362
- Fertilizing Co. v. Hyde Park (97 U. S. 659), 420, 663
- Fidelity, etc., Co. v. Waterman (161 Ill. 632; 44 N. E. Rep. 283; 32 L. R. A. 654, affirming 59 Ill. App. 297), 829
- Findlay v. Carson (97 Ia. 537; 66 N. W. Rep. 759), 110
- Findlay v. Parker (17 Ohio C. C. 294; 9 Ohio Cir. Dec. 710), 571
- Findlay v. Smith (6 Munf. 134; 8 Am. Dec. 733), 288, 289, 291
- Findlay Gaslight Co. v. Findlay (2 Ohio Cir. Ct. Rep. 237; 1 Ohio Cir. Dec. 463), 529
- Finegan v. Fall River Gas Works (159 Mass. 311; 34 N. E. Rep. 523), 741, 750
- Finnegan v. Pennsylvania Trust Co. (144 Pa. St. 613), 272
- Finnegan v. Steinner (28 Pittsb. L. J. (N. S.) 68; 5 Pa. Super. Ct. Rep. 127), 326
- Fireman's Ins. Co. v. Cecil (12 Ky. L. Rep. 48, 259), 799
- Fireman's Fund Ins. Co. v. Sherman (20 Tex. Civ. App. 343; 50 S. W. Rep. 598), 814
- First Congregational Church v. Holyoke, etc., Ins. Co. (158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587), 797, 813, 820
- First National Bank v. Dow (41 Hun 13), 64, 77, 334, 366
- First National Bank v. Harkness (42 W. Va. 156; 24 S. E. 548; 32 L. R. A. 408), 56
- First National Bank v. Sheaffer (149 Pa. St. 236; 24 Atl. Rep. 221), 369
- Fagan v. Long (30 Mo. 222), 351
- Fairchild v. Dunbar (128 Pa. St. 485; 18 Atl. Rep. 443), 76, 77, 83
- Fairchild v. Fairchild (9 Atl. Rep. (Pa.) 255), 272, 287, 290
- Fall River v. Bristol Co. (125 Mass. 567), 833

TABLE OF CASES.

iv

(References are to pages.)

- Fanker v. Anderson** (173 Pa. St. 86; 34 Atl. Rep. 434), 254, 256
- Fare v. Bath Gaslight Co.** (25 Gas J. 566), 723, 763
- Farmers', etc., Ins. Co. v. Nixon** (2 Colo. App. 265; 30 Pac. Rep. 42), 822, 825
- Farmers' Loan, etc., Co. v. Iowa Water Co.** (78 Fed. Rep. 881), 381
- Farmers' etc., Ins. Co. v. Simmons** (30 Pa. St. 299), 802
- Farnum v. Platt** (8 Pick. 339), 329
- Faulker v. Central Fire Ins. Co.** (1 Kerr (N. B.) 279), 801
- Faust v. American Fire Ins. Co.** (91 Wis. 158; 64 N. W. Rep. 883; 30 L. R. A. 783), 795, 816
- Fawcett v. Whitehouse** (1 Russ. & M. 132), 312
- Fechet v. Drake** (12 Pac. Rep. (Ariz.) 694), 645
- Federal Oil Co. v. Western Oil Co.** (112 Fed. Rep. 373), 85, 145, 198
- Felix v. Patrick** (145 U. S. 317; 12 Sup. Ct. Rep. 862), 92
- Fellows v. Walker** (39 Fed. Rep. 651), 470, 434, 559
- G
- G. V. B. Mine Co. v. First National Bank** (95 Fed. Rep. 23; 36 C. C. A. 633), 350
- G. B. Mining Co. v. First National Bank** (95 Fed. Rep. 35; 35 C. C. A. 510, affirming 89 Fed. Rep. 449), 368
- G. C. T. Railroad Tax Case** (92 U. S. 575), 337
- Gadbury v. Ohio, etc., Gas Co.** (65 N. E. Rep. (Ind. App.) 289), 211, 217
- Gadbury v. Ohio, etc., Co.** (67 N. E. Rep. (Ind.) 259), 67, 68, 69, 70, 127, 129, 145, 148, 161, 166, 172, 174, 176, 182, 190, 197, 199, 217
- Gage v. Wheeler** (129 Ill. 197; 21 N. E. Rep. 1075), 284
- Gaines v. Green Pond Iron Mining Co.** (33 N. J. Eq. 603, reversing 39 N. J. Eq. 86), 287, 288
- Galbreath v. Armour** (4 Bell App. Cases 374), 552
- Gale v. Kalamazoo** (23 Mich. 344; 9 Am. Rep. 80), 488, 507
- Gale v. Petroleum Co.** (6 W. Va. 200), 75
- Galey v. Kellerman** (123 Pa. St. 491; 23 W. N. C. 139; 16 Atl. Rep. 474), 121, 122, 181, 183, 266
- Gallagher v. Kemmerer** (144 Pa. St. 509; 22 Atl. Rep. 970), 654
- Gannon v. Patterson** (193 Ill. 372; 62 N. E. Rep. 210), 288
- Ganter v. Atkinson** (35 Wis. 48), 74
- Gardner v. Resumption, etc., Co.** (4 Colo. App. 271; 35 Pac. Rep. 674), 361
- Garman v. Potts** (135 Pa. St. 506; 26 W. N. C. 305; 19 Atl. Rep. 1071), 154, 157
- Garretson v. Merchants', etc., Co.** (81 Ia. 727; 45 N. W. Rep. 1047), 824, 826
- Garrison v. Chicago** (7 Biss. 480), 426, 446, 469, 488, 505, 507
- Gartside v. Outley** (58 Ill. 210), 74, 286
- Gas Co. v. Pittsburg** (101 U. S. 219), 836
- Gas & Water Co. v. Dowington** (175 Pa. St. 341; 38 W. N. C. 376; 34 Atl. Rep. 799), 481, 497
- Gaslight & Coke Co., *In re*** (57 Gas J. 1196), 624
- Gaslight Co. v. Donnelly** (93 N. Y. 557), 455
- Gaslight & Coke Co. v. Hardy** (17 Q. B. Div. 619), 606

(References are to pages.)

- Gaslight & Coke Co. v. Hardy** (17 Q. B. Div. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 36 W. R. 50; 51 J. P. 6), 632
- Gaslight & Coke Co. v. Herbert Smith** (3 Times Law Rep. 15), 632
- Gaslight & Coke Co. v. Mead** (45 L. J. M. C. 71), 607
- Gaslight, etc., Co. v. New Albany** (156 Ind. 406; 59 N. E. Rep. 176), 446, 453, 458, 461, 465
- Gaslight & Coke Co. v. St. George Vestry** (42 L. J. (N. S. Q. B.) 50), 393, 587
- Gaslight & Coke Co. v. Vestry of St. Mary** (15 Q. B. Div. 1; 54 L. J. Q. B. 414; 53 L. T. 457; 33 W. R. 892; 49 J. P. 459), 545
- Gavigan v. Atlantic Ref. Co.** (186 Pa. St. 604; 40 Atl. Rep. 834), 662, 665, 666
- Gee v. Pearse** (2 DeG. & Sm. 325), 319
- Geiger v. Green** (4 Gill (Md.) 472), 82
- Genet v. Delaware, etc., Co.** (35 N. Y. Supp. 147; 13 N. Y. Misc. Rep. 409), 62
- Genet v. Delaware, etc., Co.** (136 N. Y. 593; 32 N. E. Rep. 1078, reversing 122 N. Y. 505; 25 N. E. Rep. 956), 62
- Georgia Home Ins. Co. v. Jacobs** (56 Tex. 366), 824
- Gerkins v. Kentucky Salt Co.** (36 S. W. Rep. (Ky.) 1), 289, 293, 294
- Gerkins v. Kentucky Salt Co.** (100 Ky. 734; 39 S. W. Rep. 444), 289, 293, 294
- German Fire Ins. Co. v. Board** (54 Kan. 732; 39 Pac. Rep. 697), 802
- Germania Fire Ins. Co. v. Klewer** (129 Ill. 599; 22 N. E. Rep. 489), 801
- German Ins. Co. v. Roost** (55 Ohio St. 581; 45 N. E. Rep. 1097; 36 L. R. A. 236), 804
- German Ins. Co. v. Standard Gaslight Co.** (70 N. Y. Supp. 384; 34 N. Y. Misc. Rep. 594), 728
- German-American Ins. Co. v. Standard Gaslight Co.** (67 N. Y. App. Div. 539; 73 N. Y. Supp. 973), 735, 742, 746
- German-American Ins. Co. v. Standard Gaslight Co.** (34 Misc. 594; 70 N. Y. Supp. 384; 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973), 826
- German Mining Co., In re** (4 DeG. M. & G. 19; 24 L. J. Ch. 41; 18 Jur. 710; 23 L. T. (O. S.) 200; 2 W. R. 543), 348
- Gesner v. Cairns** (2 Allen (N. B.) 595), 32
- Gesner v. Gas Co.** (James (N. B.), 72), 32
- Ghee v. Northern Union Gas Co.** (158 N. Y. 510; 53 N. E. Rep. 692, reversing 34 N. Y. App. Div. 551; 56 N. Y. Supp. 450), 515
- Gibben v. Atkinson** (64 Mich. 651; 31 N. W. Rep. 570), 76
- Gibbs v. Consolidated Gas Co.** (130 U. S. 396; 9 Sup. Ct. Rep. 553), 503, 527, 536, 538, 577
- Gibney v. State** (137 N. Y. 1; 33 N. E. Rep. 142; 19 L. R. A. 365), 780
- Gibson v. Leonard** (143 Ill. 182; 32 N. E. Rep. 182, affirming 37 Ill. App. 344), 408
- Gibson v. Mullican** (58 Tex. 430), 246
- Gibson v. Oliver** (158 Pa. St. 277; 27 Atl. Rep. 961), 131
- Giffin v. Southwest, etc., Lines** (172 Pa. St. 580; 33 Atl. Rep. 578), 44
- Gill v. Weston** (110 Pa. St. 305; 1 Atl. Rep. 921), 330, 369, 645

TABLE OF CASES.

lvii

(References are to pages.)

- Gilbert's Case (L. R. 5 Ch. App. 559; 18 W. R. 938), 352
- Gilbert v. Jess (31 Wis. 110), 104
- Gillett v. Treganza (6 Wis. 343), 63
- Gillispie Tool Co. v. Wilson (123 Pa. St. 19; 16 Atl. Rep. 36), 143
- Gird v. California Oil Co. (60 Fed. Rep. 531), 55, 335
- Given v. State (66 N. E. Rep. (Ind.) 750), 32, 42, 44, 45, 55, 412, 417, 418
- Glading v. Frick (88 Pa. St. 460), 369
- Glasgow v. Chartiers (152 Pa. St. 48; 25 Atl. Rep. 232, affirming 23 Pittsb. L. J. (N. S.) 146; 31 W. N. C. 207), 107, 114, 115, 121, 160, 188, 222, 264
- Glasgow v. Chartiers Gas Co. (152 Pa. St. 48; 25 Atl. Rep. 232, affirming 22 Pittsb. L. J. (N. S.) 181), 265
- Glasgow v. Glasgow, etc., R. R. Co. ([1895] App. Cas. 376; 64 L. J. P. C. 171; 72 L. T. 809; 59 J. P. 788; 11 Rep. 226), 518
- Glasgow v. Griffith (22 Pittsb. L. J. (N. S.) 181), 91, 187, 222, 265
- Glasgow v. Patrick, etc., Co. (22 Gas J. 54), 627
- Glasgow Gas Comrs. v. Solicitor (3 Court of Sessions Rep. (4 Lewis) 857), 837
- Gleason v. Dalton (28 N. Y. App. Div. 555; 51 N. Y. Supp. 337; 85 N. Y. St. Rep. 337, reversing 23 N. Y. Misc. 18; 50 N. Y. Supp. 90), 456
- Glidden v. Sturples (52 Pa. St. 40), 281
- Gloag & Miller's Contract, *In re* (23 Ch. Div. 320; 52 L. J. Ch. 654; 48 L. T. 629; 31 W. R. 601), 317
- Gloninger v. Franklin Coal Co. (55 Pa. St. 9), 106
- Gloucester Bank v. Rudry Collier Co. ([1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 48 W. R. 486; 2 Manson 223; 12 R. 183), 372, 377
- Goddard's Appeal (1 Walker (Pa.) 97, 231, 234
- Gold v. Peoria (65 Ill. App. 602), 450, 457
- Golden Reward Mining Co. v. Buxton (97 Fed. Rep. 413), 49
- Goller v. Fett (30 Col. 481), 301
- Goodlander Milling Co. v. Standard Oil Co. (63 Fed. Rep. 400; 24 U. S. App. 7; 27 L. R. A. 583), 401
- Goodright v. Cator (2 Dougl. 485), 199
- Goodson v. Richardson (L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337), 534, 537, 553
- Goodson v. Sunbury, etc. (72 L. T. Rep. 251; 60 J. P. 585), 788
- Goodtitle v. Aiken (1 Burr 143), 333
- Goodwin v. Gilbert (9 Mass. 510), 102
- Gordon v. Butler (105 U. S. 553), 174
- Gordon v. George (12 Ind. 408), 231, 233
- Gosling v. Gaskell ([1897] A. C. 575), 608
- Gosport v. Pritchard (156 Ind. 400; 59 N. E. Rep. 1058), 446, 447, 450, 457, 458, 464, 471, 472
- Goss v. Fire Brick Co. (4 Super. Ct. (Pa.) 167), 232, 234
- Goss v. Helbing (77 Cal. 190; 19 Pac. Rep. 277), 355, 363
- Gould v. Glass (19 Barb. 179), 329
- Graeff v. Felix (24 Pa. Co. Ct. Rep. 657), 558
- Graham v. Pierce (19 Gratt. 28; 100 Am. Dec. 658), 303

(References are to pages.)

- Grand Island Gas Co. v. West (28 Neb. 852; 45 N. W. Rep. 242), 465, 475
- Grand Rapids v. Grand Rapids Hydraulic Co. (66 Mich. 606; 33 N. W. Rep. 749), 536
- Grand Rapids, etc., Co. v. American Fire Ins. Co. (93 Mich. 396; 53 N. W. Rep. 538), 808
- Grange v. Pately, et al., Co. (14 Gas J. 309), 651, 664
- Grant v. Davenport (36 Ia. 396), 450
- Graves v. Key City Gas Co. (83 Ia. 714; 50 N. W. Rep. 283), 255
- Graves v. Key City Gas Co. (93 Ia. 470; 61 N. W. Rep. 937), 577, 609, 612
- Gray v. Boston Gaslight Co. (114 Mass. 149), 391
- Gray v. Pullen (5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257), 754
- Greaney v. Holyoke (174 Mass. 437; 54 N. E. Rep. 880), 718, 766
- Great Central Gas Consumers' Co. v. Tallis (3 Gas J. 5), 587
- Great Falls W. W. Co. v. Great Northern Ry. Co. (54 Pac. Rep. (Mont.) 963), 389, 520
- Great Western, etc., Co. v. Hawkins (66 N. E. Rep. (Ind. App.) 765), 389
- Green v. Ashland Iron Co. (62 Pa. St. 97), 42
- Greenough's Appeal (9 Pa. St. 18), 278
- Greensburg Fuel Co. v. Irwin, etc., Co. (162 Pa. St. 78; 29 Atl. Rep. 274), 64
- Greenslade v. Dower (7 B. & C. 635; 1 M. & Ry. 640; 6 L. J. (O. S.) K. B. 155), 348
- Greenwald v. Ins. Co. (3 Phila. 323), 803
- Greenway v. Adams (12 Ves. Jr. 395), 246
- Gregg v. Roaring Springs, etc., Co. 70 S. W. Rep. (Mo.) 920), 297
- Gribben v. Atkinson (64 Mich. 651; 31 N. W. Rep. 570), 162, 839
- Gribbens v. Atkinson (64 Mich. 351; 31 N. W. Rep. 570), 839
- Griffin v. Fellows (81½ Pa. St. 114), 285, 286
- Griffin v. Goldsboro Water Co. (122 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240), 577, 579, 581, 597, 599
- Griffiths v. City of London Gas Co. (16 Gas J. 139), 731, 764
- Grimsley v. Hawkins (46 Fed. Rep. 400), 703
- Grinstone, *Ex parte* (Amb. 708), 279
- Grommes v. St. Paul Trust Co. (147 Ill. 634; 35 N. E. Rep. 820; 37 Am. St. Rep. 248), 171, 241, 245
- Gross v. Scott Mfg. Co. (48 Fed. Rep. 35), 174
- Grove v. Hedges (55 Pa. St. 504), 73, 77, 101
- Grover v. Howard (31 Me. 546), 94
- Grubb v. Bayard (2 Wall Jr. 81), 63, 82, 105
- Grubb v. Grubb (74 Pa. St. 25), 296
- Grubb v. Grubb (101 Pa. St. 11), 301
- Grubb v. Guilford (4 Watts (Pa.) 223), 82
- Grubb's Appeal (66 Pa. St. 117), 296
- Grubb's Appeal (90 Pa. St. 228), 296
- Grummett v. Gingrass (77 Mich. 369; 43 N. W. Rep. 999), 320
- Grundy v. Janesville (84 Wis. 574; 54 N. W. Rep. 1085), 788
- Grymes v. Boweren (6 Bing. 439), 646
- Guffey v. Clever (146 Pa. St. 548; 23 Atl. Rep. 161), 90, 225, 228

TABLE OF CASES.

lix

(References are to pages.)

- Guffey v. Deeds (9 Pa. Co. Rep. 449), 106
- Guffey v. Hukill (34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759), 70, 145, 195, 199, 200
- Guffin v. Fellows (81½ Pa. St. 114), 285, 286
- Gunther v. Liverpool, etc., Ins. Co. (85 Fed. Rep. 846; 134 N. S. 110; 10 Sup. Ct. Rep. 448), 795, 799, 802
- Guthrie v. Jones (108 Mass. 191), 632, 638
- H
- Hacker v. London Gaslight Co. (32 Gas J. 781), 624, 681, 762
- Hacker v. Philadelphia (6 Phila. 94), 570
- Haenssler v. Missouri Iron Co. (110 Mo. 188; 19 S. W. Rep. 75; 16 L. R. A. 220), 298
- Hague v. Wheeler (157 Pa. St. 324; 27 Atl. Rep. 714; 22 L. R. A. 141; 33 W. N. C. 83), 33, 44, 48, 119
- Haight v. Conners (Pa. St.) (24 Atl. Rep. 302), 94
- Hail v. Reed (15 B. Mon. 479; 11 Mor. Min. Rep. 103), 32, 33, 37, 42, 43
- Hale, etc., Co. v. Storey County (1 Nev. 105), 839
- Haley v. Dorchester, etc., Ins. Co. (12 Gray 545), 816
- Halford v. Hatch (Doug. 187), 246
- Hall v. Insurance Co. (58 N. Y. 292; 17 Am. Rep. 255), 798, 809
- Hall v. Nashville, etc., Ry. (13 Wall. 367), 827
- Hall v. Vernon (47 W. Va. 295; 34 S. E. Rep. 764; 49 L. R. A. 464), 52, 300
- Hamilton v. Delhi, etc., Co. (118 Cal. 148; 50 Pac. Rep. 378), 355, 356
- Hamilton v. Elliott (5 S. & R. 375), 199
- Hamilton v. Pittock (158 Pa. St. 457; 27 Atl. Rep. 1079), 126, 142
- Hamilton v. Hamilton Gaslight Co. (11 Ohio Dec. 513), 461, 488, 496, 508, 564
- Hamilton Gaslight & Coke Co. v. Hamilton (37 Fed. Rep. 832), 493
- Hamilton Gaslight & Coke Co. v. Hamilton (146 U. S. 258; 13 Sup. Ct. Rep. 90, affirming 37 Fed. Rep. 832), 496, 558
- Hammond v. Hopkins (143 U. S. 224), 92
- Hampton v. Cradley Heath Gas Co. (14 Gas J. 606), 713, 716, 717, 733
- Hampton v. Oxford Gas Co. (3 Gas J. 64), 590
- Hancock's Est., *In re* 7 Kulp. (Pa.) 36), 76, 272
- Handforth v. Jackson (150 Mass. 149; 22 N. E. Rep. 634), 648
- Hangen v. Albina, etc., Co. (21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424), 577, 579, 582, 585, 586
- Hankey v. Kramp (12 Ohio Cir. Ct. Rep. 95; 5 Ohio C. D. 439), 160
- Hankey v. Philadelphia Co. (5 Pa. Super. Ct. 148; 41 W. N. C. 27), 392, 393
- Hann v. Weymouth, etc., Co. (18 Gas J. 186), 728, 763
- Hanover Fire Ins. Co. v. Stoddard (52 Neb. 745; 73 N. W. Rep. 291), 796
- Harbison v. Knoxville Water Co. 53 S. W. Rep. (Tenn.) 993), 578, 594, 600
- Hardaker v. Idle Dist. Council ([1896] 1 Q. B. 335; 65 L. J. Q. B. B. (N. S.) 363; 74 Law T. Rep. 69; 44 W. R. 323; 60 J. P. 196), 738, 754
- Hardesty v. Richardson (44 Md. 617; 22 Am. Rep. 57), 315

TABLE OF CASES.

(References are to pages.)

- Hargrove v. King** (5 Ired. Eq. 430), 247
- Harkness v. Burton** (39 Ia. 101), 80, 83
- Harlan v. Coal Co.** (35 Pa. St. 237), 79
- Harlan v. Lehigh, etc., Co.** (35 Pa. St. 287), 77, 79
- Harlan v. Logansport, etc., Co.** (133 Ind. 323; 32 N. E. Rep. 930), 101, 102
- Harlem Gaslight Co. v. New York** (33 N. Y. 309, affirming 3 Robt. 100), 446, 454, 455, 462
- Harlow v. Lake Superior, etc., Co.** (36 Mich. 105), 285, 286
- Harness v. Eastern Oil Co.** (49 W. Va. 232; 38 S. E. Rep. 662), 103, 121, 122, 128, 153, 218, 260
- Harrington v. Florence Oil Co.** (178 Pa. St. 444; 35 Atl. Rep. 855), 297, 301, 304, 307
- Harris v. Cobb** (49 W. Va. 350; 38 S. E. Rep. 559), 230, 260, 273, 335
- Harris v. Heackman** (62 Ia. 411; 17 N. W. Rep. 592), 171, 245
- Harris v. Lloyd** (11 Mont. 390; 28 Pac. Rep. 736), 309, 344
- Harris v. Ohio Oil Co.** (57 Ohio St. 629; 50 N. E. Rep. 1129; 57 Ohio St. 118; 48 N. E. Rep. 502), 107, 114, 121, 122, 128, 129, 183, 190, 200
- Harrisburg, etc., Co. v. Goodman** (129 Pa. St. 206; 19 Atl. Rep. 844), 637
- Harrison, *Ex parte*** (13 Q. B. Div. 753), 606
- Harrison v. Barrow** (63 L. T. 834), 225
- Harrison v. Vreeland** (38 N. J. L. 366), 102
- Hart v. Plum** (14 Cal. 148), 641
- Hartford v. Hartford, etc., Co.** (65 Conn. 324; 32 Atl. Rep. 925), 454, 457
- Hartwell v. California Fire Ins. Co.** (84 Me. 524; 24 Atl. Rep. 954), 819
- Hartwell v. Cansman** (2 Stock Eq. (N. J.) 128), 77
- Haskell v. Gallagher** (20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250), 355, 356, 360
- Hastings v. Cutler** (24 N. H. 481), 104
- Hatcher v. Dunn** (102 Ia. 411; 71 N. W. Rep. 343; 66 N. W. Rep. 905; 36 L. R. A. 689), 787
- Hatfield v. St. John Gaslight Co.** (32 N. B. 100), 736
- Hatherton v. Bradbourne** (13 Sim. 599; 13 L. J. Ch. 171; 7 Jur. 1100), 272
- Hauk v. Standard Oil Co.** (38 N. Y. App. Div. 621; 56 N. Y. Supp. 273), 783
- Hauck v. Tidewater Pipe Line Co.** (153 Pa. St. 366; 26 Atl. Rep. 644; 20 L. R. A. 642), 408, 662, 664, 666
- Haven v. Emery** (33 N. H. 66), 630
- Haven v. Mehlgarten** (19 Ill. 90), 308
- Hawesville v. Hawes** (6 Bush. 232), 333
- Hawkins v. Pepper** (117 N. C. 407; 23 S. E. Rep. 434), 70, 83, 148, 190, 199
- Hawkins v. Robinson** (37 J. P. 662), 543
- Hawkins v. Spokane, etc., Co.** (2 Idaho 970; 28 Pac. Rep. 433), 340, 345, 348
- Hawks v. Taylor** (70 Ill. App. 255), 108
- Hawtyne v. Bourne** (7 M. & W. 595; 10 L. J. (N. S.) Exch. 224; 5 Jur. 118), 348
- Hay v. Springfield** (64 Ill. App. 671), 450, 451
- Hayden v. Stoughton** (5 Pick. 528), 185

TABLE OF CASES.

lxi

(References are to pages.)

- Hayford v. Wentworth (54 Atl. Rep. (Me.) 940), 629
 Hays v. Doane (11 N. J. Eq. 84), 634, 638, 639
 Hays v. Galion, etc., Co. (29 Ohio St. 330), 381
 Haywood v. Cope (25 Beav. 140; 27 L. J. Ch. 468; 4 Jur. (N. S.) 227; 31 L. T. (O. S.) 48; 6 W. R. 304), 313, 318
 Heal v. Niagara Oil Co. (150 Ind. 483; 50 N. E. Rep. 482), 283
 Healey v. Mutual, etc., Co. (133 Ill. 556; 25 N. E. Rep. 52), 830
 Heap v. Barton (12 C. B. 274), 646
 Heath v. Sauson (2 B. & Ad. 291), 340
 Hecksher v. Sheaffer (17 W. N. C. (Pa.) 323), 839
 Heeter v. Eckstein (50 How. Pr. 445), 247
 Heffron v. Kittanning Ins. Co. (132 Pa. St. 580; 20 Atl. Rep. 698), 803, 804
 Heh v. Consolidated Gas Co. (201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819), 698, 717, 723, 765
 Heil v. Strong (44 Pa. St. 264), 286
 Heilbron v. Cuthbert (96 Ga. 312; 23 S. E. 206), 561
 Heinouer v. Jones (159 Pa. St. 228; 28 Atl. Rep. 228), 216
 Heintz v. Shortt (149 Pa. St. 286; 24 Atl. Rep. 316), 167, 206
 Heiple v. East Portland (13 Ore. 97), 512
 Helena v. Helena W. W. Co. (122 Fed. Rep. 1), 489, 492, 496
 Heller v. Dailey (28 Ind. App. 555; 63 N. E. Rep. 490), 33, 67, 79, 94, 106, 112, 169, 170, 172, 226, 231, 232, 235, 237, 238, 239, 242, 244, 245, 365
 Heman v. St. Louis, etc., Co. (75 Mo. App. 372), 531, 532
 Hemphill v. Giles (66 N. C. 512), 366
 Hemstead v. Phoenix Gaslight, etc., Co. (3 H. & C. 745; 11 Jur. N. S. 626; 13 W. R. 662; 34 L. J. C. P. 108; 14 Gas J. 399), 755
 Henderson v. Allegheny Heating Co. (179 Pa. St. 513; 39 W. N. C. 485; 36 Atl. Rep. 312), 712, 723, 767
 Henderson v. Coal & Coke Co. (140 U. S. 25; 11 Sup. Ct. Rep. 691), 176
 Henderson v. Ferrell (183 Pa. St. 547; 41 W. N. C. 404; 38 Atl. Rep. 1018), 113, 208, 224
 Henderson v. New Castle, etc., Gas Co. (37 Sol. J. 403), 584, 709
 Henderson Bridge Co. v. Henderson City (173 U. S. 592), 431
 Hendrie v. Lea Bridge, etc., Co. (21 Gas J. 949, 989), 651, 674
 Hendrix v. Hendrix (65 Ind. 329), 229
 Hendrix v. McBeth (61 Ind. 473; 28 Amer. Rep. 680), 229, 287
 Hendy v. Dinkershoff (57 Cal. 3), 630
 Henkle v. Dillon (15 Ore. 610; 17 Pac. Rep. 148), 630, 631
 Henne v. South Penn. Oil Co. (52 W. Va. —; 43 S. E. Rep. 147), 103, 118, 132, 182, 201
 Henry v. Cleveland, etc., R. R. Co. (67 Fed. Rep. 426), 404, 407
 Henshaw v. Wells (9 Humph. 563), 367
 Heron v. Phoenix, etc., Ins. Co. (180 Pa. St. 257; 40 W. N. C. 55; 36 Atl. Rep. 740; 36 L. R. A. 517), 807, 811
 Herrington v. Wood (6 Ohio C. Ct. Rep. 326; 3 Ohio Cir. Dec. 475), 73, 75, 85, 151, 160
 Hersey v. White (9 T. L. R. 335), 613
 Hess v. Pegg (7 Nev. 23), 563

TABLE OF CASES.

(References are to pages.)

- Heuer v. Northwestern, etc., Ins. Co. (144 Ill. 393; 33 N. E. Rep. 411), 805
- Heuer v. Winchester Fire Ins. Co. (151 Ill. 331; 37 N. E. Rep. 873, affirming 45 Ill. App. 239), 805
- Hewitt, etc., Co. v. General Electric Co. (61 Ill. App. 168), 641
- Hewitt, etc., Co. v. Watertown, etc., Co. (65 Ill. App. 153), 640, 644, 646
- Hewitt Iron Mining Co. v. Dessau Co. (129 Mich. —; 89 N. W. Rep. 365; St. 138; 9 Atl. Rep. 144), 162, 275
- Heysham v. Dettre (89 Pa. St. 506), 632
- Hiberian Gaslight Co. v. Parry (L. R. 4 Ind. 453), 606
- Hichens v. Congrove (4 Russ. 562), 312
- Hieronymus v. Brenville Water Supply Co. (131 Ala. 447; 31 So. Rep. 31), 600, 605, 610, 613, 614
- Higgins v. Armstrong (9 Colo. 38; 10 Pac. Rep. 232), 342, 344, 348
- Higgins v. California, etc., Co. (109 Cal. 304; 41 Pac. Rep. 1087), 84, 103, 258
- Huggins v. Daley (99 Fed. Rep. 606; 48 L. R. A. 320), 250
- Higgins v. Hopkins (3 Exch. 163; 18 L. J. Exch. 113; 6 Ry. Cas. 75), 345
- Higgins v. San Diego (118 Cal. 524; 45 Pac. Rep. 824; 50 Pac. Rep. 670), 464, 573
- Higgins v. Samels (2 J. & H. 460; 7 L. T. 240), 319
- Hill, *Ex parte* (6 Ch. Div. 63), 606
- Hill v. Gaslight Co. (13 Gas J. 877), 720
- Hill v. Joy (149 Pa. St. 243; 24 Atl. Rep. 293), 124
- Hill v. Schneider (43 N. Y. Supp. 1; 13 N. Y. App. Div. 299; 4 N. Y. Ann. Cas. 70), 775
- Hill v. Wallasey L. B. ([1894] 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 7 Rep. 51), 517
- Hilton's Appeal (116 Pa. St. 351; 9 Atl. Rep. 342), 369
- Hilton v. Woods (L. R. 4 Eq. 432; 36 L. J. Ch. 491; 16 L. T. 736; 15 W. R. 1105), 49
- Hindson v. Markle (171 Pa. St. 138; 33 Atl. Rep. 74), 654, 658
- Hines v. Miller (122 Cal. 517; 55 Pac. Rep. 401), 354
- Hingsley v. Hillside Coal Co. (144 Pa. St. 613; 29 W. N. C. 368; 23 Atl. Rep. 253), 272
- Hipkins v. Birmingham, etc., Co. (5 H. & N. 74; 6 H. & N. 250; 9 Gas J. 63; 778; 30 L. J. Exch. 60; 9 W. R. 168), 652
- Hoag v. Lake Shore, etc., R. R. Co. (85 Pa. St. 293), 400
- Hobart v. Murray (54 Mo. App. 249), 62, 76, 77
- Hobbs v. Guardian, etc., Co. (12 Can. Sup. Ct. 631), 803, 805
- Hoch v. Bass (133 Pa. St. 328; 19 Atl. Rep. 360), 199, 217
- Hoddesdon Gas & Coke Co. (6 C. B. (N. S.) 239; 5 Jur. (N. S.); 1013; 28 L. J. C. P. 268; 7 W. R. 415; 8 Gas J. 261), 576
- Hodgson v. Parkins (84 Va. 706; 5 S. E. Rep. 710), 62, 79, 81, 161, 228
- Hodson v. Heuland ([1896] 2 Ch. 423; 65 L. J. Ch. 754; 74 L. T. 881; 44 W. R. 684), 315
- Hoehle v. Allegheny Heating Co. (5 Pa. Super. Ct. 21), 577, 589
- Hoerdt v. Hahne (91 Ill. App. 514), 171, 242, 245
- Hofer's Appeal (116 Pa. St. 360; 9 Atl. Rep. 441), 94
- Hogan v. Fayette Gas Fuel Co. (21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.) 229), 501, 529, 530

TABLE OF CASES.

lxiii

(References are to pages.)

- Hogsett v. Ellis (17 Mich. 351), 367
- Hoin v. Lancaster (13 Lanc. L. Rev. 131), 710, 722
- Holbrook v. Conner (60 Me. 578), 174
- Holbrooke v. Harrington (36 Pac. Rep. (Cal.) 365), 308
- Holden v. Liverpool, etc., Co. (3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883), 720, 745
- Holding v. Liverpool Gas Co. (3 C. B. 1; 10 Jur. 883; 15 L. J. C. P. 301; 5 N. Y. Leg. Obs. 77; Anthon N. P. 356, note), 687, 703, 708
- Holliday v. Nat. Telephone Co. (68 L. J. Q. B. 1016; 81 L. T. 252; 47 W. R. 658; 15 L. T. R. 483; [1899] 2 Q. B. 392), 754
- Hollingsworth v. Fry (4 Dall. 345), 211
- Holly v. Boston Gaslight Co. (8 Gray 123; 69 Am. Dec. 233), 681, 686, 687, 697, 698, 707, 709, 710, 720, 723, 742, 744, 749, 750, 751, 756, 768
- Holly Mfg. Co. v. New Chester Water Co. (48 Fed. Rep. 879), 364
- Holman's Appeal (24 Pa. St. 174), 294
- Holmes v. Bellingham (7 C. B. (N. S.) 329), 333
- Holt v. Gaslight & Coke Co. (L. R. 7 Q. B. Div. 728; 41 L. J. Q. B. 351; 27 L. T. (N. S.) 442), 393
- Holyrod v. Marshall (2 Giff. 382; 2 DeG. F. & J. 596; 3 L. J. Ch. 655; 30 L. J. Ch. 385; 3 L. J. Ch. 193), 646
- Honeyman v. Thomas (25 Ore. 539; 36 Pac. Rep. 656), 644
- Hood v. Easton (2 Giff. 692; 2 Jur. (N. S.) 729; 27 L. T. (O. S.) 295; 4 W. R. 575), 372, 376
- Hook v. Garfield Coal Co. (112 Ia. 210; 83 N. W. Rep. 963), 239, 296
- Hooks v. Forst (165 Pa. St. 238; 30 Atl. Rep. 846), 164, 169, 308, 309
- Hoosac Mining, etc., Co. v. Donat (10 Colo. 529; 16 Pac. Rep. 157), 268
- Hope's Appeal (29 W. N. C. (Pa.) 365; 3 Atl. Rep. 23; 2 Cent. Rep. 43; 33 Pittsb. L. J. (N. S.) 270), 62, 76, 77, 251, 272
- Hope Mining Co., *In re* (1 Sawy. 710), 356
- Hopkins v. Hudson (107 Ind. 191; 8 N. E. Rep. 81), 359
- Hopkins v. Grazebrook (6 B. & C. 31; 9 D. & R. 22; 5 L. J. (O. S.) K. B. 65), 320
- Hoppes v. Baie (105 Ia. 648; 75 N. W. Rep. 495), 360
- Horberg v. May (153 Pa. St. 216; 25 Atl. Rep. 750), 141
- Hornby v. Liverpool, etc., Gas Co. (47 J. P. 231), 788
- Horrigan v. Nowell (110 Mass. 470), 786
- Hosack v. Crill (53 Atl. Rep. (Pa.) 640), 67, 76
- Hosie v. Gray (71 Pa. St. 198), 369
- Hot Springs, etc., Co. v. Hot Springs (70 Ark. 300; 67 S. W. Rep. 761), 421
- Houghton, *In re* (20 Hun 395), 788
- Houlgate v. Surrey Consumers' Gas Co. (8 Gas J. 261), 576, 600
- Hourigan v. Lowell (110 Mass. 470), 786
- Howell v. Millville (60 N. J. L. 95; 36 Atl. Rep. 691), 563
- Howland v. Coffin (9 Pick. 52), 233
- Hovelman v. Kansas City Horse R. R. Co. (79 Mo. 632), 494

TABLE OF CASES.

(References are to pages.)

- Hoyt v. Latham (143 U. S. 553; 12 Sup. Ct. Rep. 568), 92
- Huber v. Merkel (94 N. W. Rep. (Wis.) 354), 42
- Huddle, *In re* (16 Fed. Rep. 373), 224, 226
- Huddersfield v. Ravensthorpe Urban District Council ([1897] 2 Ch. 121; 66 L. J. Ch. 581, reversing [1897] Ch. 652; 66 L. J. Ch. N. S. 286; 76 L. T. Rep. 377), 463
- Hudepohl v. Libert, etc., Co. (80 Cal. 553; 22 Pac. Rep. 339), 94
- Huff v. Austin (46 Ohio St. 386; 21 N. E. Rep. 864), 701
- Huff v. McCauley (53 Pa. St. 206), 83
- Huff v. McDonald (22 Ga. 131), 296, 301
- Huff v. Nickerson (27 Me. 106), 102
- Huffman v. State (21 Ind. App. 449; 52 N. E. Rep. 715), 552, 553, 555
- Huggins v. Daley (99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320), 68, 69, 84, 99, 107, 124, 145, 146, 166, 168, 200, 202
- Hughes v. Bucknell (8 C. & P. 566), 367
- Hughes v. Devlin (23 Cal. 501), 298
- Hughes v. Malden, etc., Co. (163 Mass. 397; 47 N. E. Rep. 125), 791
- Hughes v. Momence (163 Ill. 535; 45 N. E. Rep. 300), 492, 494, 512, 515, 565
- Hughes v. United Pipe Lines (119 N. Y. 423; 23 N. E. Rep. 1042), 32, 33, 42, 43, 293
- Hughes v. Williams (12 Ves. 493), 371, 372, 373, 376
- Hughes v. Williams (7 Ch. Div. 192; 47 L. J. Ch. 152; 26 W. R. 348), 374
- Hukill v. Guffey (37 W. Va. 425; 16 S. E. Rep. 544), 195, 219
- Hukill v. Myers (36 W. Va. 639; 15 S. E. Rep. 157), 195, 201
- Hulett v. Pudsey Gas Co. (28 Gas J. 663), 790
- Humble v. Langston (7 M. & W. 517), 244, 245
- Hummelstown v. Brunner (17 Pa. Co. Ct. Rep. 140; 5 Pa. Dist. Rep. 8), 561
- Humphreys v. McKissock (140 U. S. 304; 11 Sup. Ct. Rep. 779), 94
- Hunt v. Bay State Iron Co. (97 Mass. 279), 631
- Hunt v. Lowell Gaslight Co. (13 Gas J. 877; 1 Allen 343), 685, 720, 723, 742, 743, 749, 757, 758
- Hunt v. Lowell Gaslight Co. (8 Allen 169; 85 Am. Dec. 697; 3 Allen 410), 709, 710, 711, 730, 757, 758, 759
- Hunt's Case (37 L. J. Ch. 278; 16 W. R. 472), 352
- Hunter v. Apollo Oil & Gas Co. (54 Atl. Rep. (Pa.) 274), 253, 274
- Hunter v. Savage, etc., Co. (4 Nev. 153), 361
- Hutchinson v. Boston Gaslight Co. (122 Mass. 219), 697, 702, 710
- Hutchison v. Commonwealth (82 Pa. St. 472), 58
- Hutchinson v. Consolidated Gas Co. (4 N. Y. App. Div. 161; 38 N. Y. Supp. 929), 768
- Hutchinson v. Kay (23 Beav. 413), 634
- Hutchinson v. Kline (199 Pa. St. 564; 49 Atl. Rep. 312), 306
- Huxhan v. Llewellyn (21 W. R. 570), 314
- Hyde Park, etc., Co. v. Porter (167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152), 391, 694, 755

TABLE OF CASES.

lxv

(References are to pages.)

- Hynds v. Schenectady, etc., Ins. Co.** (11 N. Y. 554, affirming 16 Barb. 119), 807, 812
- I
- Iams v. Carnegie Natural Gas Co.** (194 Pa. St. 72; 45 Atl. Rep. 54), 154, 276
- Ibach v. Huntington, etc., Co.** (23 Ind. App. 281; 55 N. E. Rep. 249), 690, 725
- Idaho Gold Mining Co. v. Winchell** (3 Idaho —; 59 Pac. Rep. 533), 354
- Iler v. Ross** (63 Neb. —; 90 N. W. Rep. 869), 483
- Illinois, etc., Ry. Co. v. Ogle** (82 Ill. 627), 49
- Illinois Trust & Savings Bank v. Arkansas City** (76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 518), 453, 464, 489, 500, 502, 509, 530, 538
- Illinois, etc., Co. v. St. Louis** (2 Dill. 70), 488
- Imperial Fire Ins. Co. v. Fargo** (95 U. S. 227), 806
- Imperial Gaslight & Coke Co. v. London Gaslight & Coke Co.** (10 Exch. 39; 26 Eng. L. & Eq. 425; 3 Gas J. 483), 843
- Imperial Gas Co. v. Chauntler** (2 Gas J. 362), 613
- Imperial Gas Co. v. Porter** (5 Gas J. 372, 403), 624
- Independent Refiners' Association v. Western, etc., R. R. Co.** (4 Inter. Rep. 162), 384
- Indiana, etc., Gas Co. v. Anthony** (26 Ind. App. 307; 58 N. E. Rep. 868), 589, 604, 624
- Indiana, etc., Oil Co. v. Hinton** (64 N. E. Rep. (Ind.) 224), 109, 112, 256
- Indiana, etc., Co. v. Long** (27 Ind. App. 219; 59 N. E. Rep. 410), 686, 688, 724, 725, 726, 727
- Indiana, etc., Gas Co. v. New Hampshire, etc., Co.** (23 Ind. App. 298; 53 N. E. Rep. 485), 688, 725, 726, 826
- Indiana, etc., R. R. Co. v. Hartley** (67 Ill. 439), 553
- Indiana, etc., Co. v. State** (158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761), 576, 577, 621, 626
- Indiana Natural Gas & Oil Co. v. Jones** (14 Ind. App. 55; 42 N. E. Rep. 487; 12 Nat. Corp. Rep. 60), 53, 391, 392, 393
- Indiana, etc., Co. v. McMath** (26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287), 556
- Indiana Natural, etc., Co. v. McMath** (26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287), 695
- Indianapolis v. Croas** (7 Ind. 9, 12), 512
- Indianapolis v. Consumers' Gas Co.** (140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Am. and Eng. Corp. Cas. 151; 49 Am. St. Rep. 183), 421, 423, 427, 446, 544
- Indianapolis v. Indianapolis Gaslight, etc., Co.** (66 Ind. 396), 426, 427, 446, 447, 507
- Indianapolis v. Kingsbury** (101 Ind. 200; 51 Am. Rep. 749), 282
- Indianapolis v. Wann** (144 Ind. 175; 42 N. E. Rep. 901), 469
- Indianapolis, etc., R. R. Co. v. Citizens' Street R. R. Co.** (127 Ind. 369; 24 N. E. Rep. 1054; 8 L. R. A. 539; 26 N. E. Rep. 893), 478, 488
- Indianapolis, etc., Gas Co. v. Pierce** (25 Ind. App. 116; 56 N. E. Rep. 137), 229
- Indianapolis, etc., Co. v. Spaugb** (17 Ind. App. 683; 46 N. E. Rep. 691), 125, 126
- Indianapolis Gas Co. v. Indianapolis** (82 Fed. Rep. 245), 428

(References are to pages.)

- Indianapolis Gas Co. v. Shumack (23 Ind. App. 87; 54 N. E. Rep. 414), 735
- Indianapolis Gas Co. v. Teters (15 Ind. App. 475; 44 N. E. Rep. 549), 155, 160, 162
- Indianapolis Natural Gas Co. v. Kibbey (135 Ind. 357; 35 N. E. Rep. 392), 101, 102, 121, 326
- Indianapolis Natural Gas Co. v. Spaugh (17 Ind. App. 683; 46 N. E. Rep. 691), 95
- Ingalls v. St. Paul, M. & M. Ry. Co. (39 Minn. 479; 40 N. W. Rep. 524), 648
- Insurance Co. v. Tweed (7 Wall. 44), 804
- Insurance Co. of N. A. v. Fidelity, etc., Co. (125 Pa. St. 523; 16 Atl. Rep. 791; 2 L. R. A. 586), 827
- Iron Duke Mine v. Braasted (112 Mich. 79; 70 N. W. Rep. 414), 278
- Irwin v. Covode (24 Pa. St. 163), 287, 294
- Island Coal Co. v. Combs (152 Ind. 379; 53 N. E. Rep. 452), 146, 151, 167, 185, 192, 199, 215, 218
- Ives v. Wilder (114 Ia. 476; 87 N. W. Rep. 408; 54 L. R. A. 854), 785
- J
- Jackson v. Caton (5 Ves. 687), 315
- Jackson v. Groat (7 Cow. 285), 247
- Jackson v. O'Hara (183 Pa. St. 233; 38 Atl. Rep. 624), 93, 237, 265, 267
- Jackson v. Standard Oil Co. (98 Ga. 749; 26 S. E. Rep. 60), 780
- Jackson Co. Horse Ry. Co. v. Interstate Rapid Transit R. R. Co. (24 Fed. Rep. 306), 480, 488, 500
- Jacksonville, etc., Co. v. Jacksonville (36 Fla. 229; 18 So. Rep. 667; 30 L. R. A. 540), 559, 562
- Jamaica Pond, etc., Co. v. Brookline (121 Mass. 5), 542
- Jamestown, etc., Co. v. Egbert (152 Pa. St. 53; 25 Atl. Rep. 151), 262
- Jamieson v. Indiana Nat. Gas, etc., Co. (128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; 3 Inter St. Com. Rep. 613), 53, 383, 384, 388, 412, 414, 415, 420, 426
- Janes v. Emery Oil Co. (1 Penny. (Pa.) 242), 122
- Janeway v. Duluth (65 Minn. 292; 68 N. W. Rep. 243), 498, 567
- Jarechi v. Philharmonic Society (79 Pa. St. 403; 21 Am. Rep. 78), 632
- Jarechi v. Philharmonic Society Ohio Cir. Dec. 5; 14 Ohio C. C. 400), 355
- Jashanosky v. Volrath (59 Ohio St. 540; 53 N. E. Rep. 46; 69 Am. St. Rep. 786), 226
- Jefferys v. Smith (1 J. & W. 298), 338, 372, 377
- Jegon v. Vivian (L. R. 6 Ch. App. 742; 40 L. J. Ch. 389; 19 W. R. 365), 48
- Jenkins v. Columbia, etc., Co. (13 Wash. 502; 43 Pac. Rep. 328), 577, 607
- Jennings v. Alexander (1 Hilt. (N. Y.) 154), 246
- Jennings v. Broughton (5 DeG. M. & G. 126; 17 Beav. 234; 22 L. J. Ch. 585; 17 Jur. 305; 1 W. R. 441), 319
- Jennings Bros. & Co. v. Beale (158 Pa. St. 283; 27 Atl. Rep. 948), 63, 105, 106
- Jersey City, etc., Co. v. Passaic (N. J. L.) (52 Atl. Rep. 242), 538

TABLE OF CASES.

lxvii

(References are to pages.)

- Jersey City Gas Co. v. Dwight**, (29 N. J. Eq. 242), 421, 480, 491, 522, 534, 563, 575
Job v. Potton (L. R. 20 Eq. 34; 44 L. J. Ch. 262; 23 W. R. 588; 32 L. T. 110), 297, 301
Johnson v. Belmar (58 N. J. Eq. 354; 44 Atl. Rep. 166), 610
Johnson v. Sherman (15 Cal. 287; 76 Am. Dec. 481), 233
Johnson v. Wiseman (4 Met. (Ky.) 357; 83 Am. Dec. 475), 634
Johnston, *In re* (137 Cal. 115; 69 Pac. Rep. 974), 491, 501, 514, 518, 531, 533
Johnston v. Cowan (59 Pa. St. 275), 162
Johnston v. People's Natural Gas Co. (7 Atl. Rep. (Pa.) 167; 5 Cent. Rep. 564; 15 Morr. Min. Rep. 556), 383, 388
Johnston v. Price (172 Pa. St. 427; 33 Atl. Rep. 688; 37 W. N. C. 387; 26 Pittsb. L. J. (N. S.) 357), 304, 306
Johnston Iron Co. v. Cambria Iron Co. (32 Pa. St. 241), 80, 106
Johnston, etc., R. R. Co. v. Egbert (152 Pa. St. 53; 25 Atl. Rep. 151), 131, 132, 187
Johnston v. People's, etc., Gas Co. (5 Cent. Rep. (Pa.) 564), 491, 501, 530
Johnston v. Standard Mining Co. (148 U. S. 360; 13 Sup. Ct. Rep. 585), 92
Johnston v. Toronto Consumers' Gas Co. ([1898] App. Cas. 447; 78 L. T. 270; 67 L. J. P. C. 33), 587, 605
Joliet Gaslight Co. v. Sutherland (68 Ill. App. 230), 522, 527, 539
Jonas v. Cincinnati (18 Ohio 318), 469
Jones v. Barnes (45 Mo. App. 590), 245
Jones v. Carter (15 M. & W. 718), 199
Jones v. Clark (42 Cal. 180), 342, 347, 348, 349, 351
Jones v. Forest Oil Co. (194 Pa. St. 379; 44 Atl. Rep. 1074; 30 Pittsb. L. J. (N. S.) 58; 48 L. R. A. 748), 34, 44, 47
Jones v. Howard Ins. Co. (117 N. Y. 103; 22 N. E. Rep. 518; 10 N. Y. St. Rep. 120), 798, 799, 801
Jones v. Rochester Gas, etc., Co. (7 N. Y. App. Div. 474; 39 N. Y. Supp. 1110), 627
Jones v. Rochester Gas, etc., Co. (7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105, affirmed 158 N. Y. 678; 52 N. E. Rep. 1124), 577, 578, 582, 588, 594
Jones v. Rochester, etc., Co. (168 N. Y. 65; 60 N. E. Rep. 1044, reversing 64 N. Y. Supp. 1138), 588
Jones v. Strong (5 Kulp. (Pa.) 7), 278, 288, 291
Jones v. Western, etc., Gas Co. (146 Pa. St. 204; 23 Atl. Rep. 386; 29 W. N. C. 266), 183
Jones v. Wood (2 Ohio Dec. 75; 9 Ohio Cir. Rep. 560; 6 Ohio Cir. Dec. 538, reversing 1 Ohio N. P. 155), 840
Jordan v. Myers (126 Cal. 565; 58 Pac. Rep. 1061), 354
Jordeson v. Sutton, etc., Co. (67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137, affirmed 68 L. J. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692), 576
Judge v. Braswell (13 Bush. 69; 26 Am. Rep. 185), 338, 348, 349
Judson v. Giant Powder Co. (107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718), 703, 778, 779
Jurgenson v. Diller (114 Cal. 491; 46 Pac. Rep. 610), 353, 354

(References are to pages.)

- K**
- Kahn v. Central Smelting Co. (102 U. S. 641), 340, 341
- Kahn v. Old Telegraph Mining Co. (2 Utah 13), 296
- Kalamazoo v. Kalamazoo, etc., Co. (124 Mich. 74; 82 N. W. Rep. 811), 525, 531
- Kamphouse v. Gaffner (73 Ill. 453), 79, 82
- Keating, etc., Co. v. Marshall, etc., Co. (74 Tex. 605; 12 So. W. Rep. 489), 649
- Keeler v. Keeler (31 N. J. Eq. 181, 191), 634, 636
- Keeler v. Trueman (15 Colo. 143; 25 Pac. Rep. 311), 78
- Keenan v. Dubuque, etc., Ins. Co. (13 Ia. 375), 825
- Keihl v. South Bend (76 Fed. Rep. 921; 44 U. S. App. 687; 22 C. C. A. 618; 36 L. R. A. 228), 446, 450, 451, 475
- Keir v. Peterson (41 Pa. St. 357), 33, 43
- Keiser v. Mahony Gas Co. (143 Pa. St. 276; 22 Atl. Rep. 759), 666
- Kelly v. Donahoe (2 Metc. (Ky.) 482), 333
- Kelley v. Ohio Oil Co. (57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721, affirming 6 Ohio C. Ct. Dec. 470; 9 Ohio C. C. 511; 34 Wkly. L. Bull. 185; 40 Wkly L. Bull. 338; 6 Ohio Dec. 186), 32, 43, 44, 51, 119
- Kelly v. Worcester, etc., Ins. Co. (97 Mass. 284; 5 Benn. Fire Ins. Co. 122), 802
- Kemble v. Kemble (44 N. J. Eq. 454; 11 Atl. Rep. 733), 298
- Kemble Coal & Iron Co. v. Scott (90 Pa. St. 332), 162
- Kennard v. Standard Oil Co. (89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451), 661, 662
- Kennedy v. Crawford (138 Pa. St. 561; 27 W. N. C. 306; 21 Atl. Rep. 191), 155, 166, 168, 207, 210, 216, 346
- Kenrick v. Smick (T. W. & S. 41), 180
- Kenton Ins. Co. v. Downs (90 Ky. 236; 13 S. W. Rep. 882; 12 Ky. L. Rep. 115), 810, 822
- Kenton Gas, etc., Co. v. Dorney (17 Ohio C. Ct. Rep. 101; 9 Ohio Cir. Dec. 604), 68, 191, 200, 289, 293
- Kenton Gas, etc., Co. v. Orwick (21 Ohio Cir. Ct. Rep. 274; 11 Ohio C. D. 786), 128
- Kentucky Heating Co. v. Louisville Gas Co. (63 S. W. Rep. (Ky.) 651; 23 Ky. L. Rep. 730), 529
- Keogh v. Pittston, etc., Co. (5 Lack. Leg. N. 242), 515
- Kerns v. Tanner (66 Pa. St. 297), 215, 216
- Kerlin, etc., Co. v. Toledo (20 Ohio C. C. Rep. 603; 8 Ohio N. P. 62), 67, 76, 571
- Kerr v. Bellefontaine (59 Ohio St. 446; 52 N. E. Rep. 1024), 571
- Kettening Gas Co. v. Leach (24 Gas J. 503), 845
- Keyes v. Pittsburgh, etc., Co. (58 Ohio St. 246; 50 N. E. Rep. 911; 41 L. R. A. 681), 280
- Keystone Mining Co. v. Gallagher (5 Colo. 23), 355, 356
- Kieble v. Philadelphia (105 Pa. St. 41), 686, 707, 744, 749, 768
- Kiddle v. Brown (20 Ala. 412; 56 Am. Dec. 202), 82
- Kier v. Peterson (41 Pa. St. 357), 136, 277, 285, 287
- Kilbridge v. Carbon, etc., Co. (201 Pac. Rep. 552; 51 Atl. Rep. 347), 777
- Kile v. Giebner (114 Pa. St. 381; 7 Atl. Rep. 154), 638

TABLE OF CASES.

Lxix

(References are to pages.)

- Kille v. Reading Iron Works** (141 Pa. St. 440; 21 Atl. Rep. 666), 319
- Kimmel v. Burfeind** (2 Daly 155), 741
- Kincaid v. Indianapolis, etc., Co.** (124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602), 549, 551, 552
- Kincaid v. McGowan** (88 Ky. 91; 4 S. W. Rep. 802), 77
- King v. Edwards** (32 Ill. App. 558), 190
- King v. Jones** (3 Camp. 230), 514
- King v. Oxford, etc., Society** (51 L. T. 94), 661
- King v. Philadelphia Co.** (154 Pa. St. 160; 26 Atl. Rep. 308; 21 L. R. A. 141; 41 Am. and Eng. Corp. Cas. 221), 537
- Kings County Fire Ins. Co. v. Swigert** (11 Ill. App. 590), 800, 825
- Kingsley v. Hillside, etc., Co.** (144 Pa. St. 613; 23 Atl. Rep. 250), 62, 78, 323, 326
- Kingsley v. McFarland** (82 Me. 231; 19 Atl. Rep. 442), 648
- Kinnaird v. Standard Oil Co.** (89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451), 651
- Kinnaman v. Pyle** (44 Ind. 275), 281
- Kirby v. Delaware, etc., R. R. Co.** (20 N. Y. App. Div. 473; 46 N. Y. Supp. 777), 701
- Kuchli v. Minnesota, etc., Co.** (58 Minn. 418; 59 N. W. Rep. 1088), 469
- Kirk v. Mattier** (140 Mo. 23; 41 S. W. Rep. 252), 75, 140
- Kirchman v. Lapp** (19 N. Y. Supp. 831), 632
- Kirkwood v. Merameo Highlands Co.** (94 Mo. App. 637; 68 S. W. Rep. 761), 488
- Kitchen v. Smith** (101 Pa. St. 452), 73, 74, 81, 136, 137
- Kleppner v. Lemon** (176 Pa. St. 502; 35 Atl. Rep. 109; 29 Pittsb. L. J. (N. S.) 21, 346; 38 W. N. C. 388, affirmed 198 Pa. St. 430; 48 Atl. Rep. 483), 107, 113, 114, 118, 121, 127, 128, 129, 148, 207, 274
- Knarr v. Conaway** (42 Ind. 260), 172
- Knight v. Indiana, etc., Co.** (47 Ind. 105), 73
- Knight v. Mfgs. Natural Gas Co.** (23 Atl. Rep. (Pa.) 164; 29 W. N. C. 261), 108
- Knotts v. McGregor** (47 W. Va. 566; 35 S. E. Rep. 899), 107
- Knupp v. Bight** (186 Pa. St. 181; 40 Atl. Rep. 414), 244
- Kock's Appeal** (93 Pa. St. 434), 114
- Kock v. Maryland Coal Co.** (68 Md. 125; 11 Atl. Rep. 700), 48
- Koelsch v. Philadelphia Co.** (152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653), 682, 686, 687, 688, 697, 707, 717, 731, 768
- Koen v. Bartlett** (41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128), 230, 288, 289, 292, 294
- Kohler Brick Co. v. N. W. Ohio, etc., Gas Co.** (11 Ohio Cir. Ct. 319; 5 Ohio Cir. Dec. 379), 745
- Kohlmann v. Selvage** (34 N. Y. App. Div. 380; 54 N. Y. Supp. 230), 802
- Kokomo, etc., Gas Co. v. Albright** (18 Ind. App. 151; 47 N. E. Rep. 682), 253, 590
- Kokomo Natural Gas Co. v. Albright** (18 Ind. App. 151; 47 N. E. Rep. 682), 100, 107
- Koplan v. Boston Gaslight Co.** (177 Mass. 15; 58 N. E. Rep. 183), 692, 706, 714, 715, 732, 733, 756, 757, 761

(References are to pages.)

- Kosten v. Interstate, etc., Co.** (99 Wis. 73; 74 N. W. Rep. 534; 40 L. R. A. 651), 830
- Kruger v. Western, etc., Ins. Co.** (72 Cal. 91; 13 Pac. Rep. 156), 822
- Krueger v. Wisconsin Tel. Co.** (106 Wis. 96; 81 N. W. Rep. 1041; 50 L. R. A. 298), 549
- Kreutz v. McKnight** (53 Pa. St. 319), 190, 220
- Krzywoszynski v. Consolidated Gas Co.** (4 N. Y. App. Div. 161; 38 N. Y. Supp. 929), 690, 768
- Kunkle v. People's Gas Co.** (165 Pa. St. 133; 30 Atl. Rep. 719; 33 L. R. A. 847), 101, 283
- Kyffin v. East London W. W. Co.** (66 Gas J. 243), 588, 600
- L
- La Campagne pour L'Eclairage au Gas v. La Campagne, etc.** (25 Can. S. C. 168), 492
- Lackland v. North. Mo. R. R. Co.** (31 Mo. 180), 563
- Lacustrine, etc., Co. v. Lake Guano, etc., Co.** (82 N. Y. 476), 77
- Ladd v. Boston** (170 Mass. 332; 49 N. E. Rep. 627; 40 L. R. A. 171), 618, 633
- Ladd v. Jones** (61 Ill. App. 584), 557
- Ladley v. Creighton** (70 Pa. St. 490), 369
- La Force v. Williams, etc., Ins. Co.** (43 Mo. App. 518), 796, 808, 822
- Lake Charles Ice, etc., Co. v. Lake Charles** (106 La. 65; 30 So. Rep. 289), 447, 457
- Lake Erie, etc., Co. v. Patterson** (184 Pa. St. 364; 39 Atl. Rep. 68), 169
- Lake Erie, etc., R. R. Co. v. Lowder** (7 Ind. App. 537; 34 N. E. Rep. 447, 747), 400
- Lake Superior Ship Canal, etc., Co. v. McCann** (86 Mich. 106; 48 N. W. Rep. 692), 639, 641
- Lamar Water, etc., Co. v. Lamar** (140 Mo. 145; 39 S. W. Rep. 768), 450, 474
- Lambie v. Sloss, etc., Co.** (118 Ala. 427; 24 So. Rep. 108), 62
- Lancaster Gas Co., In re** (5 Pa. Dist. Rep. 244), 481, 483
- Lancaster v. DeTrafford** (31 L. J. Ch. 554; 7 L. T. 40; 10 W. R. 474; 8 Jur. (N. S.) 873), 313
- Lancaster Fire Ins. Co. v. Lenheim** (89 Pa. St. 497; 33 Am. Rep. 778), 795
- Lancaster Gas & Fuel Co. v. Lancaster Gas Co.** (17 Pa. Co. Ct. Rep. 453), 480, 483
- Lancaster Hotel Co. v. Lancaster** (7 Pa. Super. Ct. 159; 42 W. N. C. 164), —
- Landell v. Hamilton** (175 Pa. St. 327; 34 Atl. Rep. 663), 108
- Lane v. Gordon** (18 N. Y. App. Div. 438; 46 N. Y. Supp. 57), 208, 216
- Langabough v. Anderson** (22 Ohio Cir. Ct. Rep. 178; 12 Ohio C. D. 341), 777
- Langdon v. New York, etc., Ins. Co.** (1 Hall (N. Y.) 226), 812, 815
- Langmade v. Weaver** (65 O. S. 17; 60 N. E. Rep. 992), 100
- Langston v. Bates** (84 Ill. 524; 25 Am. Rep. 466), 315
- Lanigan v. New York, etc., Co.** (71 N. Y. 29), 704, 747, 750
- Lanman v. Young** (31 Pa. St. 306), 176
- Lannen v. Albany Gaslight Co.** (46 Barb. 264; 44 N. Y. 459), 708, 728, 732, 751, 764
- Lanning v. Osborne** (76 Fed. Rep. 319, affirmed Osborne v. San Diego, etc., Co., 178 U. S. 22; 20 Sup. Ct. Rep. 860), 430, 433
- Lanning v. Osborne** (82 Fed. Rep. 575), 431

TABLE OF CASES.

lxxi

(References are to pages.)

- Lattimore v. Harsen (14 Johns. 330), 274
- Lawrence v. Hennessy (165 Mo. 659; 65 S. W. Rep. 717), 508
- Lawrence v. Kemp (1 Duer 363), 639, 645
- Lawrence v. Methuen (166 Mass. 206; 44 N. E. Rep. 247), 463
- Lawrence v. Robinson (4 Colo. 567), 338, 339, 346
- Lawson v. Kirchner (50 W. Va. 344; 40 S. E. Rep. 344), 76, 270
- Lawton v. Lawton (3 Atk. 13), 646
- Lawton v. Salmon (1 H. B. 259), 646
- Laycock v. Baton Rouge (35 La. Ann. 475), 468
- Laythoarp v. Bryant (2 Bing. N. C. 735; 5 L. J. C. P. 217; 3 Scott 238; 2 Hodges 25), 314
- Lazarus' Est., *In re* (145 Pa. St. 1; 23 Atl. Rep. 372), 76, 78, 272
- Leadville Water Co. v. Leadville (22 Colo. 297; 45 Pac. Rep. 362), 433, 469, 599
- Lean v. Boston (106 Mass. 450), 547
- Letherman v. Oliver (151 Pa. St. 646; 25 Atl. Rep. 309), 266, 267, 183, 184
- Lebanon Gas Co. v. Lebanon Fuel, etc., Co. (5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223). 52, 501, 530
- Lebanon, etc., Co. v. Leap (139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342), 555, 556, 693, 695, 730, 788
- Le Claire v. Davenport (13 Ia. 210), 488
- Lee v. Baumgardner (86 Va. 315; 10 S. E. Rep. 3), 63, 78
- Lee v. Roundwood Colliery Co. ([1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324), 227
- Lee v. Troy, etc., Co. (98 N. Y. 115), 721, 742, 749, 768
- Lee v. Vacuum Oil Co. (54 Hun 156; 7 N. Y. Sup. 426), 408, 666, 701, 730
- Le Fevre v. Le Fevre (4 S. & R. 241), 82
- Leftwich v. Neal (7 W. Va. 569), 281
- Leggett v. Ætna Ins. Co. (10 Rich. L. 202), 812, 814
- Lehigh, etc., Co. v. Wight (177 Pa. St. 387; 35 Atl. Rep. 219), 273
- Lehigh, etc., Co. v. Wilkesbarre, etc., Co. (8 Kulp. (Pa.) 540), 273
- Lehigh Coal Co. v. Wright (7 Kulp. (Pa.) 434; 15 Pa. Ct. Rep. 433), 76
- Lehigh Zinc and Iron Co. v. Bamford (150 U. S. 665; 14 Sup. Ct. Rep. 219, affirming 33 Fed. Rep. 677), 271
- Lehigh Valley Coal Co. v. Jones (86 Pa. St. 432), 735, 751
- Lemfers v. Henke (73 Ill. 405), 287, 298
- Lennox v. Vandalia Coal Co. (66 Mo. App. 560; 158 Mo. 473; 59 S. W. Rep. 242), 267
- Leport v. Mining Co. (3 N. J. L. Jr. 280), 42, 370, 371
- LeRoy, *In re* (23 N. Y. Misc. 53; 50 N. Y. Supp. 611), 567
- Lester v. Hardesty (29 Md. 50), 365
- Lester v. Lester (28 Gratt. 737), 315
- Letherman v. Oliver (151 Pa. St. 646; 31 W. N. C. 205; 25 Atl. Rep. 309), 183, 184, 266, 267
- Levering v. Langley (8 Minn. (Gil. 82) 107), 171, 242, 245
- Levis Water Co., *In re* (11 Pa. Ct. Rep. 178), 463, 483
- Levis v. Newton (75 Fed. Rep. 884), 427
- Levy v. Water Works Co. (38 La. Ann. 29), 612, 619
- Lewis v. Boston Gaslight Co. (165 Mass. 411; 43 N. E. Rep. 178), 714, 717

TABLE OF CASES.

(References are to pages.)

- Lewis v. Brooks (8 Up. Can. Q. B. 576), 171, 242, 245
- Lewisville Natural Gas Co. v. State (135 Ind. 49; 34 N. E. Rep. 702; 21 L. R. A. 734; 43 Am. & Eng. Corp. Cas. 483; [overruling Rushville v. Rushville Natural Gas Co., 132 Ind. 575; 28 N. E. Rep. 853; 38 Am. & Eng. Corp. Cas. 276; 15 L. R. A. 321]), 421
- Lewey v. H. C. Frick Co. (166 Pa. St. 536; 31 Atl. Rep. 261; 28 L. R. A. 283), 327
- Lietch v. Atlantic, etc., Ins. Co. (66 N. Y. 100), 809
- Liggett v. Shira (159 Pa. St. 350; 33 W. N. C. 553; 25 Atl. Rep. 218; 28 Atl. Rep. 218), 183, 187
- Light Co. v. Gill (14 Pa. Co. Ct. Rep. 6), 363, 635
- Light and Fuel Co., *In re* (17 Pa. Co. Ct. Rep. 113; 4 Pa. Dist. Rep. 244), 480, 483
- Light and Heat Co. v. Jackson (73 Miss. 598; 19 So. Rep. 771), 452, 460, 508
- Lillibridge v. Lackawanna Coal Co. (143 Pa. St. 293; 22 Atl. Rep. 1035), 76, 77, 329
- Lima Gas Co. v. Lima (4 Ohio Cir. Ct. Rep. 22; 22 Wkly. L. Bull. 272; 2 Ohio Cir. Dec. 396), 530
- Linden Steel Co. v. Imperial Refining Co. (138 Pa. St. 10; 20 Atl. Rep. 867, 869), 364
- Lindsay v. Bridgewater Gas Co. (24 Pittsb. L. J. (N. S.) 276; 14 Pa. Co. Ct. Rep. 181), 826
- Line v. Stephenson (5 Bing. N. C. 183; 7 L. J. C. P. 263; 7 Scott 69; 1 Arn. 385), 268
- Lingeman v. Shirk (15 Ind. App. 432; 43 N. E. Rep. 33), 95
- Linn v. Chambersburg (160 Pa. St. 511; 28 Atl. Rep. 842), 558
- Lithgow v. Shook (39 Ohio Wkly. L. Bull. 39), 94
- Little Valerie, etc., Co. v. Ingersoll (14 Colo. App. 240; 59 Pac. Rep. 970), 359
- Littlewood v. Equitable Gas Co. (8 Gas J. 541), 601
- Littman v. New York City (36 N. Y. App. Div. 189; 55 N. Y. Supp. 383, affirmed 159 N. Y. 559; 54 N. E. Rep. 1093), 698, 722, 723
- Liverpool, etc., Ins. Co. v. Gunther (116 U. S. 113; 34 Fed. Rep. 501; 6 Sup. Ct. Rep. 306), 799, 802, 813
- Livingston v. Rawyards (5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357), 49
- Llynvi Coal Co. v. Brogden (L. R. 11 Eq. 181; 40 L. J. Ch. 46; 24 L. T. 612), 49
- Lloyd v. Newell ([1895] 2 Ch. 744; 64 L. J. Ch. 744; 73 L. T. 154; 44 W. R. 43), 316
- Lloyd v. Washington Gaslight Co. (1 Mackey 331), 608
- Loan v. Boston (106 Mass. 450), 787
- Lockhart v. Rollins (2 Idaho 503; 21 Pac. Rep. 413), 224
- Loeber v. Roberts (17 N. Y. Supp. 378), 701
- Logan v. Payne (43 Ia. 524; 22 Am. Rep. 261), 488
- Logan v. Washington Co. (29 Pa. St. 373), 77, 839
- Logan Natural Gas, etc., Co. v. Chillicothe (65 Ohio St. 186; 62 N. E. Rep. 122), 425, 428, 434, 452
- Logansport v. Dikeman (116 Ind. 15; 17 N. E. Rep. 587), 457
- Logansport, etc., Gas Co. v. Peru (89 Fed. Rep. 185), 431, 432, 433, 499
- London, etc., Ins. Co. v. Fischer (92 Fed. Rep. 500, affirming 83 Fed. Rep. 807), 814, 815, 824
- London v. Mitford (14 Ves. 58), 314

TABLE OF CASES.

lxxiii

(References are to pages.)

- London, etc., R. R. Co. v. Truman** (11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388), 671
London Gaslight Co. v. Nicholls (2 C. & P. 365), 605
London Gaslight Co. v. Vestry of Chelsea (8 C. B. (N. S.) 215; 40 Gas J. 292), 471, 606
Long v. Duluth (49 Minn. 280; 51 N. W. Rep. 913), 498, 508
Long v. Miller (4 C. P. Div. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720), 314
Long v. Wade (70 Me. 358), 366
Long Island Water Supply Co. v. Brooklyn (166 U. S. 685; 17 Sup. Ct. Rep. 718; 28 Chicago L. News 313, affirming 143 N. Y. 596; 38 N. E. Rep. 983), 491, 492, 565
Los Angeles v. Los Angeles City Water Co. (177 U. S. 558; 20 Sup. Ct. Rep. 736; 124 Cal. 377), 425, 428, 429, 432, 459, 489, 527, 564
Losee v. Buchanan (51 N. Y. 476), 701
Louisiana State Board v. Standard Oil Co. (107 La. Ann. —; 31 So. Rep. 1015), 418
Louisville v. Louisville Water Co. (105 Ky. 754; 49 S. W. Rep. 766), 516
Louisville v. Wible (84 Ky. 290; 1 S. W. Rep. 605), 488
Louisville Gas Co. v. Citizens' Gas Co. (115 U. S. 683; 6 Sup. Ct. Rep. 265; 10 Am. & Eng. Corp. Cas. 671 [reversing 81 Ky. 263; 1 Am. & Eng. Corp. Cas. 156]), 420, 422, 426, 494, 538
Louisville Gas Co. v. Dulaney (100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. & Eng. Corp. Cas. (N. S.) 241), 431, 578, 594, 618, 625
Louisville Gas Co. v. Gutenkuntz (82 Ky. 432), 685, 732, 740
Lowenstein v. Fidelity & Casualty (88 Fed. Rep. 474, affirmed 97 Fed. Rep. 17), 830
Lowther v. Cavendish (1 Eden. 99), 646
Lowther Oil Co. v. Guffey (43 S. E. Rep. (W. Va.) 101), 71
Lowther Oil Co. v. Miller-Sibley Oil Co. (44 S. E. Rep. (W. Va.) 433), 34, 42, 49, 70, 71, 151, 160, 168, 176
Loy v. Madison, etc., Gas Co. (156 Ind. 332; 58 N. E. Rep. 844), 256
Luce v. Dorchester, etc., Ins. Co. (105 Mass. 297), 809
Lulay v. Barnes (172 Pa. St. 331; 34 Atl. Rep. 53; 37 W. N. C. 409), 321
Lumsden's Case (L. R. 4 Ch. App. 31; 17 W. R. 65), 352
Lunsford v. La Motte Lead Co. (54 Mo. 426), 83
Lushington v. Sewell (1 Simm. 435), 646
Luzerne Water Co. v. Toby Creek Water Co. (148 Pa. St. 568; 24 Atl. Rep. 117), 482
Lyddal v. Clavering (Amb. 371), 279
Lykens Valley Coal Co. v. Dock (62 Pa. St. 232), 42, 226
Lyman v. Arnold (5 Mason 195), 333
Lyman v. Schwartz (13 Colo. App. 318; 57 Pac. Rep. 735), 345
Lynch v. Lynch (6 Irish L. R. 131), 110, 171, 242
Lynch v. Seymour (15 Can. Sup. Ct. Rep. 341), 81
Lynch v. Versailles Fuel Gas Co. (165 Pa. St. 518; 35 W. N. C. 558; 30 Atl. Rep. 984), 193, 215, 219, 271
Lynde v. Hough (27 Barb. 415), 247
Lynn's Appeal (31 Pa. St. 44), 287
Lyon v. Grorley (53 Pa. St. 261), 42

(References are to pages.)

- Lyon v. Reed (13 M. & W. 285; 2 Platt Leases 503), 110, 111, 171, 242
- M
- Machride v. Weekes (22 Beav. 533; 2 Jur. (N. S.) 918; 28 L. T. (O. S.) 135), 319
- Mackin v. Portland Gas Co. (38 Ore. 120; 61 Pac. Rep. 134; 62 Pac. Rep. 20; 49 L. R. A. 596), 577, 607, 609
- Madison v. Morristown, etc., Co. (52 Atl. Rep. (N. J. Ch.) 158), 502, 515, 516
- Maher v. Shull (11 Colo. App. 322; 52 Pac. Rep. 1115), 354
- Maine v. Grand Trunk Ry. (142 U. S. 217; 12 Sup. Ct. Rep. 121, 163), 837
- Maitland v. C. L. & R. R. Co. (3 Ohio Leg. News 289), 758
- Malcomson v. Wappoo Mills (85 Fed. Rep. 907), 75
- Malone v. Big Flat, etc., Co. (76 Cal. 578; 18 Pac. Rep. 772), 355, 357, 362, 363
- Malone v. Lancaster, etc., Co. (182 Pa. St. 309; 40 W. N. C. 434; 14 Lanc. L. Rep. 321; 15 Nat. Corp. Rep. 98; 37 Atl. Rep. 932), 501, 845
- Malott v. Price (109 Ind. 22; 9 N. E. Rep. 718), 630
- Manganese Co. v. Trotter (29 N. J. Eq. 561), 105
- Manhattan Gaslight Co. v. Barker (7 Robt. (N. Y.) 523), 549, 674
- Manhattan Gaslight Co. v. Ely (39 Barb. 174), 605
- Manhattan Gas Co. v. Flamme (12 N. Y. Wkly. Dig. 245), 623
- Manufacturers' Gas and Oil Co. v. Indiana, etc., Co. (156 Ind. 679; 59 N. E. Rep. 169), 414
- Manhattan Trust Co. v. Dayton Natural Gas Co. (55 Fed. Rep. 181), 442, 475
- Manhattan Trust Co. v. Dayton (59 Fed. Rep. 327; 8 C. C. A. 140; 16 U. S. App. 588), 426, 442, 453, 475, 508
- Manly v. Howlett (55 Cal. 94), 315
- Manning v. Frazier (96 Ill. 279), 76, 79, 272
- Mansfield v. Blackburne (3 Scott (N. S.) 820; 6 Bing. N. C. 427), 647
- Manufacturers', etc., Co. v. Douglass (130 Pa. St. 283; 18 Atl. Rep. 630), 101
- Manufacturers' Gas and Oil Co. v. Indiana, etc., Co. (155 Ind. 566; 58 N. E. Rep. 851), 33, 35, 44, 45, 47, 383, 384, 386, 388, 392, 393, 414
- Manufacturers' Gas and Oil Co. v. Indiana, etc., Co. (156 Ind. 679; 60 N. E. Rep. 1080), 47, 385, 388
- Manville v. Parks (7 Colo. 128; 2 Pac. Rep. 212), 340, 344, 348
- Maple v. John (42 W. Va. 30; 24 S. E. Rep. 608; 32 L. R. A. 800), 119, 126
- Maril v. Connecticut Fire Ins. Co. (95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835), 809, 810, 812, 816, 817
- Mark v. National Fire Ins. Co. (24 Hun 565, affirmed 91 N. Y. 663), 53, 800
- Marlborough Gaslight Co. v. Neal (166 Mass. 217; 44 N. E. Rep. 139), 527, 568
- Marlborough Gaslight Co. v. Neal (166 Mass. 217; 44 N. E. Rep. 139), 460
- Marmet v. Archibald (37 W. Va. 778; 17 S. E. Rep. 299), 100
- Marquis of Bute v. Thompson (13 M. & W. 487; 14 L. J. Exch. 95), 79
- Marriage, etc., *In re* ([1896] 2 Ch. 663), 608
- Marsh v. Butterworth (4 Mich. 575), 251

(References are to pages.)

- Marsh v. Chickering** (101 N. Y. 396; 5 N. E. Rep. 56), 792
- Marsh v. Holley** (42 Conn. 453), 296
- Marshall v. Forest Oil Co.** (198 Pa. St. 33; 47 Atl. Rep. 927), 189, 210
- Marshall v. Mellon** (179 Pa. St. 371; 36 Atl. Rep. 201; 27 Pittsb. L. J. (N. S.) 214; 35 L. R. A. 816; 57 Am. St. Rep. 601), 51, 289, 293
- Marshall v. Mellon** (26 Pittsb. L. J. (N. S.) 290; 17 Pa. Co. Ct. Rep. 366), 135
- Marshall v. Welwood** (38 N. J. L. 339), 701
- Martin v. Porter** (5 M. & W. 352; 2 H. & H. 70), 48
- Martineau v. Steele** (14 Wis. 272), 235
- Marvin v. Brewster, etc., Co.** (55 N. Y. 538), 77, 329
- Maryland Fire Ins. Co. v. Whiteford** (31 Md. 219), 814
- Maryland Steel Co. v. Moorney** (88 Md. 482; 42 Atl. Rep. 60; 42 L. R. A. 482), 780
- Mascott v. First, etc., Ins. Co.** (69 Vt. 116; 37 Atl. Rep. 255), 819
- Mascott v. Granite, etc., Ins. Co.** 35 Atl. Rep. 75; 68 Vt. 253), 809, 810, 819
- Mason v. Hill** (3 B. & Ad. 304; 5 B. & Ad. 1; 2 N. & W. 747; 2 L. J. K. B. 118), 675
- Mason v. Ohio, etc., Co.** (52 W. Va. —; 41 S. E. Rep. 418), 420, 426
- Massachusetts National Bank v. Shinn** (18 N. Y. App. Div. 276; 46 N. Y. Supp. 329), 648
- Massot v. Moses** (3 S. C. 168), 78, 79, 105
- Mather v. Frazer** (2 Kay. & J. 536; 25 L. J. Ch. 361), 647
- Mathews v. People's, etc., Gas Co.** (179 Pa. St. 165; 39 W. N. C. 544; 27 Pittsb. L. J. (N. S.) 421; 36 Atl. Rep. 216), 140, 183, 184, 196, 197, 264, 268
- Matson v. Farm Building Fire Ins. Co.** (73 N. Y. 310; 29 Am. Rep. 149, reversing 9 Hun 415), 807
- Matthiesson, etc., Co. v. La Salle** (117 Ill. 411; 2 N. E. Rep. 406; 8 N. E. Rep. 81), 333
- Mauderbach v. Bethany, etc., Home** (109 Pa. St. 231; 2 Atl. Rep. 422), 229
- Mauldin v. Grenville** (33 S. C. 1; 11 S. E. Rep. 434; 8 L. R. A. 291), 562
- Maxwell v. Brierly** (10 Copp. L. D. 50), 32, 55
- Maxwell v. Todd** (112 N. C. 777; 16 S. E. Rep. 926), 70, 146, 190, 191, 199, 215
- May v. Hazlewood Oil Co.** (152 Pa. St. 518; 25 Atl. Rep. 564), 68, 150, 172, 213
- May v. Thompson** (20 Ch. Div. 705; 51 L. J. Ch. 917; 47 L. T. 295), 315
- Maynell v. Surtees** (3 Sm. & G. 101), 318
- Mays v. Cincinnati** (1 Ohio St. 268), 563
- Mays v. Dwight** (82 Pa. St. 462), 135, 142
- McBee v. Loftis** (1 Stroh. Eq. 90), 321
- McBee v. Sampson** (66 Fed. Rep. 416), 233
- McCahan v. Wharton** (121 Pa. St. 424; 15 Atl. Rep. 615), 156, 163
- McCarnus v. Citizens' Gaslight Co.** (40 Barb. 380), 788
- McCarty v. Mellon** (5 Pa. Dist. Rep. 425), 192, 193, 195
- McClay v. Western Pennsylvania Gas Co.** (201 Pa. St. 197; 50 Atl. Rep. 878), 123
- McCleary County Coal Co. v. Long** (81 Ill. 359), 48

(References are to pages.)

- McClintock v. Dana (106 Pa. St. 386), 290
- McClung v. North Bend, etc., Co. (31 Wkly. L. Bull. 9; 9 Ohio Cir. Ct. Rep. 259; 6 Ohio Cir. Dec. 243; 1 Ohio Dec. 247), 663, 665
- McConnell v. Denver (35 Cal. 365), 342
- McConnell v. Lawrence, etc., Gas Co. (30 Pittsb. L. J. (N. S.) 346), 275
- McCord v. Mining Co. (64 Cal. 134), 296, 301
- McCord v. Oakland Quick Silver Mining Co. (64 Cal. 134), 303
- McCormick v. Sutton (97 Cal. 373; 32 Pac. Rep. 444), 335
- McCune v. Norwich City Gas Co. (30 Conn. 521; 79 Am. Dec. 278), 575
- McDaniel v. Springfield W. W. Co. (48 Mo. App. 273), 607
- McDermott v. Burke (16 Cal. 580), 367
- McDivitt v. Philadelphia Gas Co. (160 Pa. St. 367; 28 Atl. Rep. 948) 525
- McDonald, *In re* (16 Misc. (N. Y.) 304; 39 N. Y. Supp. 367), 585, 622
- McDowell v. Hendrix (67 Ind. 513), 161, 229, 233
- McElhenny v. Hubert Oil Co. (61 Pa. St. 188), 310, 311
- McElwain's Appeal (11 Atl. Rep. (Pa.) 453), 64
- McElwaine v. Brown (11 Atl. Rep. (Pa.) 453), 359
- McElwaine v. Hosey (135 Ind. 481; 35 N. E. Rep. 272), 357, 360
- McFadden v. Los Angeles County (74 Cal. 571; 16 Pac. Rep. 397), 432
- McFarland v. Peabody Ins. Co. (6 W. Va. 425), 806
- McFarland v. St. Paul, etc., Ins. Co. (46 Minn. 519; 49 N. W. Rep. 253), 807, 824
- McFarlan v. Watson (3 N. Y. 286), 246
- McGahan v. Indianapolis, etc., Gas Co. (140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355; 49 Am. St. Rep. 199), 690, 697, 705, 737
- McGillivray v. Evans (27 Cal. 92), 299, 300
- McGregor v. Camden (47 W. Va. 193; 34 S. E. Rep. 936), 662, 664, 668
- McGregor v. Equitable Gas Co. (21 Atl. Rep. 13; 139 Pa. St. 230), 393, 396
- McGuffie v. Carter (42 Mich. 497; 4 N. W. Rep. 211), 229
- McGuire v. Wight (18 W. Va. 507), 278
- McIntyre v. McIntyre Coal Co. (105 N. Y. 264; 11 N. E. Rep. 645), 114, 271
- McKay v. Pennsylvania Water Co. (6 Pa. Dist. Rep. 364; 27 Pittsb. L. J. (N. S.) 406), 395
- McKeage v. Hanover Fire Ins. Co. (81 N. Y. 38; 37 Am. Rep. 471), 636
- McKee v. Colwell (7 Pa. Super. Ct. 607), 188
- McKelway v. Seymour (29 N. J. L. 321), 199
- McKenna v. Bridge Water Co. (193 Pa. St. 333; 45 Atl. Rep. 52; 47 L. R. A. 790), 691, 724, 739
- McKenzie v. Bismarck Water Co. (6 N. D. 361; 71 N. W. Rep. 608), 381
- McKinney v. Reader (7 Watts. (Pa.) 123), 168
- McKircker v. Hawley (16 Johns. 289), 366
- McKnight v. Kreutz (51 Pa. St. 232), 176, 190, 200, 217
- McKnight v. Natural Gas Co. (146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790), 114, 145, 160, 275

TABLE OF CASES.

lxxvii

(References are to pages.)

- McLaren v. Byrnes** (80 Mich. 275; 45 N. W. Rep. 143), 357, 361
McLean v. Palmer (2 Kulp. (Pa.) 349), 632
McMillan v. Philadelphia Co. (159 Pa. St. 142; 28 Atl. Rep. 220), 84, 89, 174, 184, 392
McNally v. Connolly (70 Cal. 3; 11 Pac. Rep. 320), 320
McNeal, etc., Co. v. Howland (111 N. C. 615; 16 S. E. Rep. 857; 20 L. R. A. 743), 363
McNeal Pipe, etc., Co. v. Woltman (114 N. C. 178; 19 S. E. Rep. 109), 364
McNish v. Stone (152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232), 68, 148, 166, 168
McQuire v. Wright (18 W. Va. 507), 644
McRea v. Central Nat. Bank (66 N. Y. 489), 629
McShane v. Kenkle (18 Mont. 208; 44 Pac. Rep. 979; 33 L. R. A. 851), 335
Meadville Fuel Gas Co.'s Appeal (4 Atl. Rep. (Pa.) 733; 14 Am. and Eng. Corp. Cas. 123, reversing 1 Pa. C. C. Rep. 448), 427, 483
Meagher v. Reed (14 Colo. 335; 24 Pac. Rep. 681; 9 L. R. A. 455), 345
Mears v. Humboldt Ins. Co. (92 Pa. St. 15; 37 Am. Rep. 647), 800
Mears v. Insurance Co. (92 Pa. St. 15; 37 Am. Rep. 647), 813, 817, 822
Mechanics', etc., Ins. Co. v. Floyd (20 Ky. L. Rep. 1538; 49 S. W. Rep. 543), 815
Medex v. Gaslight & Coke Co. (15 Gas J. 75), 723, 764
Meeker v. Browning (9 Ohio C. D. 108; 17 Ohio C. C. 548), 126, 253, 258, 262, 274
Meiers v. Metropolitan Gaslight Co. (11 Daly 119), 588
Meistrell v. Reach (56 Mo. App. 243), 356
Mellon v. Allegheny Co. (3 Pa. Dist. Ct. Rep. 422), 838
Melms v. Pabst Brewing Co. (104 Wis. 7; 79 N. W. Rep. 738), 291
Memphis v. Memphis Gayoso Co. (9 Heisk. 531), 568
Memphis v. Memphis Water Co. (5 Heisk. 495), 479, 480
Memphis Gaslight Co. v. State (6 Coldw. 310; 98 Am. Dec. 452), 645, 832
Memphis Gayoso Gas Co. v. Williamson (9 Heisk. 314), 438, 490
Menneilley v. Employers', etc., Corp. (148 N. Y. 596; 43 N. E. Rep. 54; 31 L. R. A. 686, affirming 25 N. Y. Supp. 230), 759, 829, 830
Merchants', etc., Ins. Co. v. Washington, etc., Ins. Co. (1 Handy 408), 808
Mercur v. State Lime, etc., Co. (171 Pa. St. 12; 32 Atl. Rep. 1126), 301
Meridian National Bank v. McConica (8 Ohio C. Ct. Rep. 442; 4 Ohio Cir. Dec. 106), 73, 342, 360
Merrifield v. Lombard (13 Allen 16), 653
Merrill v. Frame (4 Taunt. 329), 268
Merrimac River Savings Bank v. Lowell (152 Mass. 556; 26 N. E. Rep. 97; 10 L. R. A. 122), 591, 607
Merritt v. Judd (14 Cal. 60), 640
Mersey Docks & Harbor Board v. Liverpool, etc., Co. (26 Gas J. 327), 734, 762
Metropolitan, etc., Assn. v. Froiland (161 Ill. 30; 43 N. E. Rep. 766, affirming 59 Ill. App. 522), 830
Metropolitan, etc., Managers v. Hill (6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664), 672

(References are to pages.)

- Metropolitan Gas Co. v. Hyde Park (27 Ill. App. 361, affirmed 130 Ill. 42; 22 N. E. Rep. 616), 522
- Metropolitan Gaslight Co. v. Mayor (4 N. Y. Wkly. Dig. 82), 472
- Mettler v. Miller (129 Ill. 630; 22 N. E. Rep. 529), 281
- Metzger v. Beaver Falls (178 Pa. St. 1; 39 W. N. C. 108; 27 Pittsb. L. J. (N. S.) 102; 35 Atl. Rep. 1134, overruling Lehigh Water Co.'s Appeal, 102 Pa. St. 515), 482
- Metzger v. Schultz (16 Ind. App. 454; 43 N. E. Rep. 886; 45 N. E. Rep. 619), 717, 719, 741
- Mickle v. Douglas (75 Ia. 78; 39 N. W. Rep. 198), 221
- Midland R. W. Co. v. Fisher (125 Ind. 19; 24 N. E. Rep. 756), 102
- Middle, etc., Co. v. Oakbank Oil Co. (18 Ct. Sess. Cas. 4th Series 788), 547
- Miles v. Delaware, etc., Co. (140 Pa. St. 623; 21 Atl. Rep. 427), 839
- Milford v. Milford Water Co. (124 Pa. 610; 17 Atl. Rep. 185), 475
- Millandon v. New Orleans Ins. Co. (4 La. Ann. 15; 3 Benn. Fire Ins. Cas. 4), 804
- Miller v. Balfour (138 Pa. St. 183; 22 Atl. Rep. 86), 68, 188, 277
- Miller v. Butterfield (79 Cal. 62; 21 Pac. Rep. 543), 344
- Miller v. Lapham (44 Vt. 434), 328
- Miller v. Michel (13 Ind. App. 190; 41 N. E. Rep. 467), 268
- Millett v. Davey (31 Beav. 470; 32 Leg. Ch. 122; 7 L. T. 551; 11 W. R. 176; 9 Jur. (N. S.) 92), 372, 375, 376
- Millington v. Griffiths (30 L. T. 65; 23 Gas J. 215), 651, 652
- Millvale Borough, *In re* (162 Pa. St. 374; 29 Atl. Rep. 641, 644), 482
- Milnes v. Hudersfield (11 App. Cas. 511; 56 L. J. Q. B. 1; 55 L. T. 617; 34 W. R. 761; 50 J. P. 676, Affirming L. R. 12; Q. B. Div. 443; and L. R. 10 Q. B. Div. 124), 616
- Milwaukee Gaslight Co. v. Schooner Gamecock (23 Wis. 144), 549, 696
- Minshull v. Lloyd (2 M. & W. 459), 646
- Minturn v. La Rue (23 How. 435), 498
- Miser v. O'Shea (37 Ore. 231; 62 Pac. Rep. 491), 82
- Mississinewa Mining Co. v. Patton (129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203), 53, 687, 699, 723
- Missouri, etc., Co. v. Murphy (170 U. S. 78, affirming 130 Mo. 10; 31 S. W. Rep. 594), 444, 515
- Mitchell v. Burwell (110 Ia. 10; 81 N. W. Rep. 193), 359, 363
- Mitchell v. Negaunee (113 Mich. 359; 71 N. W. Rep. 646; 38 L. R. A. 157), 559
- Mitchell v. Potomac Ins. Co. (183 U. S. 42; 22 Sup. Ct. Rep. 22, affirming 16 U. S. App. D. C. 241), 806
- Mobile & Ohio R. R. Co. v. Davis (130 Ill. 146; 22 N. E. Rep. 850), 512
- Monfort v. Lanyon Zinc Co. (72 Pac. Rep. (Kan.) 784), 70, 74, 84, 92, 93, 113, 152, 155, 173, 193, 194, 195, 306
- Monroe v. Armstrong (96 Pa. St. 307), 146, 166, 168, 198
- Monroe v. Perkins (9 Pick. 298), 274
- Montague v. Dent (10 Rich. 135; 67 Am. Dec. 572), 633
- Montgomery v. Capital City Water Co. (92 Ala. 361; 9 So. Rep. 339), 532, 533

(References are to pages.)

- Montgomery v. Fireman's Ins. Co.** (16 B. Mon. 427), 805
- Montgomery Gas Co. v. Montgomery** (87 Ala. 245; 6 So. Rep. 113; 4 L. R. A. 616), 480, 500, 503
- Montjoy v. Pillow** (64 Miss. 705; 2 So. Rep. 108), 488
- Montooth v. Gamble** (123 Pa. St. 240; 16 Atl. Rep. 594), 641
- Montpelier, etc., Co. v. Stephenson** (22 Ind. App. 175; 53 N. E. Rep. 444)
- Montreal Gas Co. v. Cadieux** (11 Can. Q. B. 93), 608, 610
- Montreal Gas Co. v. Cadieux** (68 L. J. P. C. 126; [1889] App. Cas. 589; 81 L. T. (N. S.) 274), 608
- Montreal v. Standard Light & Power Co.** ([1897] App. Cas. 527; 66 L. J. P. C. 113; 77 L. T. 115), 517
- Moody v. Alexander** (145 Pa. St. 571; 23 Atl. Rep. 161), 332
- Moon v. Pittsburg Plate Glass Co.** (24 Ind. App. 34; 56 N. E. Rep. 108), 156, 276
- Moore's Appeal** (4 Pa. Dist. Rep. 703), 840
- Moore v. Jennings** (47 W. Va. 181; 34 S. E. Rep. 793), 51, 126
- Moore v. Miller** (8 Pa. St. 272), 62, 74
- Moore v. Protection Ins. Co.** (29 Me. 97; 48 Am. Dec. 514), 812
- Moore v. Rollins** (45 Me. 493), 287
- Moore v. Small** (19 Pa. St. 461), 315
- Moreland v. Frick Coke Co.** (170 Pa. St. 33; 32 Atl. Rep. 634), 321
- Morey v. Metropolitan Gaslight Co.** 38 N. Y. Supr. Ct. 185 (6 J. & S. 185), 577, 590, 607, 610
- Morgan v. Powell** (9 M. & W. 672), 49
- Morgan v. Yard** (13 Pittsb. L. J. (N. S.) 178; 12 W. N. C. 449), 229
- Morganstern v. Thrift** (66 Cal. 577; 6 Pac. Rep. 689), 350
- Moritz v. Lovelle** (77 Cal. 10; 18 Pac. Rep. 803), 94
- Morris v. Guffey** (188 Pa. St. 534; 41 Atl. Rep. 731), 102
- Morris v. Southworth** (154 Ill. 118; 39 N. E. Rep. 1099), 701
- Morristown v. East Tennessee, etc., Co.** (115 Fed. Rep. 304), 420, 502, 516, 522, 530
- Morrow, *Ex parte*** (1 Lowell's Dec. 386; 2 N. B. R. (2d ed.) 665), 638
- Morrow v. Sawyer** (82 Ga. 226; 8 S. E. Rep. 51), 229
- Morse v. Buffalo, etc., Ins. Co.** (30 Wis. 534; 11 Am. Rep. 587), 800
- Morss v. Gleason** (64 N. Y. 204), 341
- Mose v. Hastings, etc., Co.** (4 Tr. & F. 324; 13 Gas J. 231), 707
- Mosley v. Vermont, etc., Ins. Co.** (55 Vt. 142), 54
- Mostyn v. Lancaster** (23 Ch. Div. 683; 51 L. J. Ch. 696; 46 L. T. 648; 48 L. T. 715; 31 W. R. 3, 686), 378, 380
- Moule v. Garrett** (L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697), 231, 235, 244
- Mountjoy's Case** (Godb. 18; 1 Amb. 307; 4 Leon. 147), 105
- Moyers v. Tiley** (32 Pa. St. 267), 197
- Mudsill Mining Co. v. Watrous** (61 Fed. Rep. 163; 9 C. C. A. 415), 174
- Mueller v. Egg Harbor City** (55 N. J. L. 245; 26 Atl. Rep. 89), 513
- Muhlenberg v. Henning** (116 Pa. St. 138; 9 Atl. Rep. 144), 68, 162
- Municipal Chamber of Hamburg v. Gas Co.** (5 Gas J. 710), 549
- Munroe v. Armstrong** (96 Pa. St. 307), 179, 182

(References are to pages.)

- Munn v. Illinois (94 U. S. 113), 440, 618
 Munn v. Stone (4 Cush. 146), 329
 Murdock v. Chenango, etc., Ins. Co. (2 N. Y. 210), 801
 Murphy v. Hardee (12 Ohio Cir. Ct. Dec. 837), 226
 Murphy v. Stell (43 Tex. 123), 315
 Murray v. Allard (100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740), 32, 33, 51, 322, 330
 Murray v. Gibson (21 Ill. App. 488), 553
 Murray v. Haverty (70 Ill. 318), 247, 296, 297
 Murray v. Heinze (17 Mont. 353; 42 Pac. Rep. 1057; 43 Pac. Rep. 713), 195
 Murtland v. Callihan (2 Pa. Super. Ct. Rep. 340; 38 W. N. C. 512), 304, 307, 353
 Murzesheimer v. Continental Ins. Co. (5 Jones & S. (N. Y.) 332), 524
 Musgrove v. Bonser (5 Ore. 313; 20 Am. Rep. 737), 184
 Musick v. Barney (49 Mo. 458), 104
 Mutual Electric Light Co. v. Ashworth (118 Cal. 1; 50 Pac. Rep. 10), 533
 Myers v. Hudson, etc., Co. (44 Atl. Rep. (N. J.) 713, reversing 37 Atl. Rep. 618), 525
- N
- Napier v. Darlington (70 Pa. St. 64), 91
 Narcross v. James (140 Mass. 188; 2 N. E. Rep. 946), 109
 Nash v. Berkmeir (83 Ind. 536), 282
 Nassau, etc., Co. v. Brooklyn (25 Hun 567), 832
 Nation's Case (L. R. 3 Eq. 77; 36 L. J. Ch. 112; 15 L. T. 308; 15 W. R. 143), 352
 National Bank v. North (160 Pa. St. 303; 28 Atl. Rep. 394), 636
 National Foundry, etc., Works v. Oconto Water Co. (52 Fed. Rep. 29), 363, 513, 522
 National Meter Co. v. Poughkeepsie (75 Fed. Rep. 405), 620
 National Transit Co. v. Weston (121 Pa. St. 485; 15 Atl. Rep. 569), 277
 National W. W. Co. v. Kansas City (28 Fed. Rep. 921), 542
 National W. W. Co. v. Kansas City (20 Mo. App. 237), 542
 Natural Gas Co. v. Philadelphia Co. (158 Pa. St. 317; 27 Atl. Rep. 951), 88, 120, 224, 263
 Natural Gas Co. v. Pittsburg (1 Pa. Co. Ct. Rep. 311), 527, 534
 Natural Oil, etc., Co. v. Teel (67 S. W. Rep. (Tex. Civ. App.) 45; 68 S. W. Rep. 979), 71, 93, 211
 Neal v. Atlantic Refining Co., (4 Pa. Dist. Rep. 49), 779
 Neale v. Neale (9 Wall. 1), 315
 Nebraska City v. Nebraska, etc., Co. (9 Neb. 339; 2 N. W. Rep. 870), 446, 459, 464, 613, 837
 Neel v. Neel (19 Pa. St. 323), 287, 288, 294
 Neeley v. City of Henderson (55 S. W. Rep. (Ky.) 554), 835
 Negley v. Morgan (46 Pa. St. 281), 232
 Nego v. Barber, etc., Co. (17 Mo. App. 294), 63
 Neill v. Lacy (110 Pa. St. 294; 1 Atl. Rep. 325), 840
 Neill v. Shamburg (158 Pa. St. 263; 27 Atl. Rep. 992), 306, 342
 Nelson v. Bridges (2 Beav. 239; 3 Jur. 1098), 318
 Nelson v. Eachel (158 Pa. St. 372; 27 Atl. Rep. 1103), 193, 216
 Nelson v. La Porte (33 Ind. 258), 471
 Nelson v. O'Neal (1 Mont. 284), 654

TABLE OF CASES.

lxxxi

(References are to pages.)

- Neumoyer v. Andreas (57 Pa. St. 446), 80
- Nene Valley v. Dunkley (4 Ch. Div. 1), 314
- Neosho City Water Co. v. Neosho (136 Mo. 498; 38 S. W. Rep. 89), 452, 472, 508, 568
- Nesbit v. Godfrey (155 Pa. St. 251; 25 Atl. Rep. 621), 276
- Nevada Sierra Oil Co. v. Home Oil Co. (98 Fed. Rep. 673), 326, 335
- New Albany W. W. v. Leonsville (122 Fed. Rep. 776), 459
- New Castle Water Co. v. West New Castle Water Co. (6 Pa. Dist. Rep. 10; 18 Pa. Co. Ct. 498), 483
- New England, etc., Ins. Co. v. Wetmore (32 Ill. 221), 801
- New Gaslight Co. (7 Pa. Dist. Rep. 151; 1 Dauph. Co. Rep. 22), 483, 530
- New Memphis Gas, etc., Co. v. Memphis (72 Fed. Rep. 952), 426, 428, 430
- New Orleans v. Clark (95 U. S. 644), 568
- New Orleans v. Gaslight Co. (5 La. Ann. 439), 674
- New Orleans Gaslight Co. v. Hart (40 La. Ann. 474; 4 So. Rep. 215; 8 Am. St. Rep. 844; 20 Am. and Eng. Corp. Cas. 258), 426, 444, 473, 548
- New Orleans, etc., Co. v. Louisiana, etc., Co. (11 Fed. Rep. 277), 536
- New Orleans Gas Co. v. Louisiana Light Co. (115 U. S. 650; 10 Am. and Eng. Corp. Cas. 689; 6 Sup. Ct. Rep. 252), 420, 422, 426, 493, 577
- New Orleans Gaslight Co. v. New Orleans (42 La. Ann. 118; 7 So. Rep. 559), 450
- New Orleans, etc., Co. v. Paulding (12 Rob. (La.) 378), 577, 578, 607, 609
- New Orleans W. W. Co. v. Ernst (32 Fed. Rep. 5), 493, 500
- New Orleans Water Works v. Rivers (115 U. S. 674; 6 Sup. Ct. Rep. 273), 493, 500
- New Rochelle Water Co., *In re* (46 Hun 525), 388
- New York v. Squire (145 U. S. 175), 444
- New York, etc., Ins. Co. v. Langdon (6 Wend. 623), 812, 815
- New York Central, etc., R. R. v. Metropolitan Gaslight Co. (5 Hun 201), 577
- New York, etc., Co. v. Metropolitan Gaslight Co. (63 N. Y. 326; 5 Hun 201), 390
- New York Gaslight Co. v. Mechanics' Fire Ins. Co. (2 Hall. 108), 630
- New York Life Ins. Co. v. Allison (107 Fed. Rep. 179; 46 C. C. A. 229), 631, 636
- New York Mail, etc., Co. v. Shea (30 N. Y. App. Div. 266; 51 N. Y. Supp. 563, reversing 49 N. Y. Supp. 951), 518
- New York Mutual Gaslight Co. v. New York City (49 How. Pr. 227), 469
- Newark v. Newark W. W. Co. (4 Ohio N. P. 341; 6 Ohio Dec. 518), 541
- Newark, etc., Board v. Passaic (45 N. J. Eq. 393; 18 Atl. Rep. 106), 654
- Newark Coal Co. v. Upson (40 Ohio St. 17), 77
- Newark Gas, etc., Co. v. Newark (8 Ohio S. & C. P. Dec. 418; 7 Ohio N. P. 76), 257, 424, 524
- Newberryport Water Co. v. Newberryport (168 Mass. 541; 47 N. E. Rep. 533), 292
- Newport v. Commonwealth (21 Ky. L. Rep. 42; 50 S. W. Rep. 845; 51 S. W. Rep. 243; 45 L. R. A. 518), 835
- Newport v. Newport Light Co. (84 Ky. 166), 480, 489, 573

(References are to pages.)

- Newport v. Newport Light Co. (11 Ky. L. Rep. (Ky.) 840; 12 S. W. Rep. 1040), 447, 489, 528
- Newport Light Co. v. City of Newport (14 Ky. L. Rep. 464; 20 S. W. Rep. 434), 835
- Niagara Fire Ins. Co. v. De Graff (12 Mich. 124), 815
- Niagara Fire Ins. Co. v. Fidelity (125 Pa. St. 516; 16 Atl. Rep. 791), 827
- Nichols v. Brush, etc., Co. (53 Hun 137; 6 N. Y. Supp. 601), 747, 782
- Nicholasville Water Co. v. Nicholasville (18 Ky. L. Rep. (Ky.) 592; 36 S. W. Rep. 549; 38 S. W. Rep. 430), 464
- Nigro v. Hatch (11 Pac. Rep. (Ariz.) 177), 640
- Niles W. W. Co. v. Niles (59 Mich. 311; 26 N. W. Rep. 525), 469
- Nilson v. Goldstein (152 Pa. St. 493; 25 Atl. Rep. 493), 94
- Nisbet v. Mitchell Innes (7 R. 575), 633
- Nisbet v. Nash (52 Cal. 540), 342, 347
- Noble v. Sylvester (42 Vt. 146), 42
- Noblesville v. Noblesville Gas, etc., Co. (157 Ind. 162; 60 N. E. Rep. 1032), 421, 424, 425, 431, 577, 596, 597, 599
- Noke's Case (4 Rep. 80b. Cro. Eliz. 674), 268
- Nolan v. Lovelock (1 Mont. 224), 340, 344, 347, 348, 349
- Normantown Gas Co. v. Pope (52 L. J. Q. B. 629; 32 W. R. 134; 49 L. T. 798), 547
- North v. Percival ([1898] 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552), 316
- North Springs Water Co. v. Tacoma (21 Wash. 517; 58 Pac. Rep. 773; 47 L. R. A. 214), 496, 565
- Northern, etc., Co. v. Crawford (24 Tex. Civ. App. 574; 59 S. W. Rep. 916), 810, 818
- Northern Colorado, etc., Co. v. Richards (22 Colo. 450; 45 Pac. Rep. (423), 585, 594, 601
- Northern Liberties v. Northern Liberties Gas Co. (12 Pa. St. 318), 420, 427, 532, 545
- Northern Pacific Ry. v. Walker (47 Fed. Rep. 681), 335
- Northwestern Ohio, etc., Co. v. Browning (15 Ohio Cir. Ct. Rep. 84; 8 Ohio C. D. 188), 150, 201, 220, 215
- Northwestern Ohio, etc., Co. v. City of Tiffin (59 Ohio St. 420; 54 N. E. Rep. 77; 41 Wkly. L. Bull. 48), 88, 103, 152
- Northwestern, etc., Co. v. Davis (9 Ohio C. Ct. Rep. 551; 38 Wkly. L. Bull. 200; 40 Wkly. L. Bull. 251; 6 Ohio Cir. Dec. 529), 84
- Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co. (40 Wis. 446), 796, 826
- Northwestern Ohio, etc., Co. v. Ulery (67 N. E. Rep. (Ohio) 494), 103, 230
- Norton v. Cooper (5 DeG. M. & G. 728; 25 L. J. Ch. 121; 23 L. T. (O. S.) 125; 2 W. R. 362), 373, 375, 377
- Norton v. Snyder (2 Hun 82), 329
- Norwalk Gaslight Co. v. Norwalk (63 Conn. 495; 28 Atl. Rep. 32), 545
- Norwich Fire Ins. Society v. Standard Oil Co. (59 Fed. Rep. 984; 8 C. C. A. 433; 19 U. S. App. 460), 827
- Norwich Gaslight Co. v. Norwich City Gas Co. (25 Conn. 19), 446, 486, 537
- O
- Oak Harbor Gas Co. v. Murphy (7 Ohio Dec. 700), 157

TABLE OF CASES.

lxxxiii

(References are to pages.)

- Oak Ridge Coal Co. v. Rogers (108 Pa. St. 147), 43
- Ober v. Schenck (23 Utah 614; 65 Pac. Rep. 1073), 228
- Oconto Water Co. v. National Foundry (59 Fed. Rep. 19; 7 C. C. A. 603), 363, 364, 508
- O'Donnell v. Luskin (12 Mont. Co. L. Rep. (Pa.) 109), 75
- Offerman v. Starr (2 Pa. St. 394), 73
- Ogden v. Jennings (62 N. Y. 526), 93
- Ogden v. Hatry (145 Pa. St. 640; 23 Atl. Rep. 334), 183, 266, 267
- Oglesbys v. Hughes (96 Va. 115; 30 S. E. Rep. 439), 99
- Ohio, etc., Co. v. Fishburn (61 Ohio St. 608; 56 N. E. Rep. 457), 775
- Ohio Gas Fuel Co. v. Andrews (50 Ohio St. 695; 35 N. E. Rep. 1059; 29 L. R. A. 337), 556, 694
- Ohio Iron Co. v. Auburn Iron Co. (64 Minn. 404; 67 N. W. Rep. 221), 202
- Ohio Oil Co. v. Geiest (30 Ind. App. —; 65 N. E. Rep. 534), 256
- Ohio Oil Co. v. Harris (1 Ohio N. P. 132; 1 Ohio Dec. 157), 128, 147, 207
- Ohio Oil Co. v. Hurlburt (14 Ohio C. C. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305), 146, 148, 182, 191, 192
- Ohio Oil Co. v. Indiana (177 U. S. 190; 20 Supr. Ct. Rep. 585), 33, 34, 39, 42, 44, 55, 417, 418
- Ohio Oil Co. v. Kelley (9 Ohio C. C. Rep. 511; 6 Ohio Cir. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186), 64, 127, 129
- Ohio Oil Co. v. Lane (59 Ohio, St. 307; 52 N. E. Rep. 791; 40 Wkly. L. Bull. 404; 41 Wkly. L. Bull. 121), 252, 276
- Ohio Oil Co. v. Toledo, etc., Co. (4 Ohio C. Ct. Rep. 210; 2 Ohio Cir. Dec. 505), 73
- Ohio Valley Gas Co., *In re* (6 Pa. Dist. Rep. 200; 27 Pittsb. L. J. (N. S.) 321), 383, 390, 395
- Oil City Gas Co. v. Robinson (99 Pa. St. 1; 13 Repr. 253), 718, 731, 747, 749
- Oil City Fuel Supply Co. v. Boundy (122 Pa. St. 449; 15 Atl. Rep. 865), 750
- Oil Creek, etc., R. R. Co. v. Keighron (74 Pa. St. 316), 399
- O'Keefe v. Kennedy (3 Cush. 325), 247
- Old Town v. Dooley (81 Ill. 255), 333
- Olive Land, etc., Co. v. Olmstead (103 Fed. Rep. 568), 335
- Oliver v. Goetz (125 Mo. 370; 28 S. W. Rep. 441), 220
- Olmstead v. Morris Aqueduct (47 N. J. L. 311), 575
- Omaha, etc., Co. v. Burns (49 Neb. 229; 68 N. W. Rep. 492), 360
- Omaha, etc., Co. v. Tabor (13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236), 43, 79, 82, 293, 297, 305
- Omaha Horse Ry. Co. v. Cable Tramway Co. (30 Fed. Rep. 324), 490, 528
- Omaha Ry. Co. v. Granite Ins. Co. (63 Neb. 514; 73 N. W. Rep. 950), 827
- Omberg v. U. S., etc., Association (111 Ky. 303; 40 S. W. Rep. 909), 830
- Omslaer v. Philadelphia Co. (31 Fed. Rep. 354; 18 Pittsb. L. J. (N. S.) 4), 549, 696
- O'Neil v. Buffalo Fire Ins. Co. (3 N. Y. 122), 813
- Ontario Natural Gas Co. v. Gosfield (18 Ont. App. 626; 38 Am. and Eng. Corp. Cas. 253), 32, 333
- Ontario Natural Gas Co. v. Smart (19 Ont. Rep. 595), 32, 45
- Opinion of the Justices (150 Mass. 592; 24 N. E. Rep. 1084; 8 L. R. A. 487), 558

(References are to pages.)

- Oram's Estate (5 Kulp. (Pa.) 423), 278
 Orient Ins. Co. v. Leonard (120 Fed. Rep. 808), 805
 Orth v. West & East Oil Co. (159 Pa. St. 388; 28 Atl. Rep. 180), 360
 Osborne v. San Diego, etc., Co. (178 U. S. 22; 20 Sup. Ct. Rep. 860, affirming 76 Fed. Rep. 319), 428
 Osgood v. Abbott (58 Me. 73), 199
 Oskaloosa Water Co. v. Board (84 Ia. 407; 51 N. W. Rep. 18), 833
 Otersbach v. Philadelphia (161 Pa. St. 111; 28 Atl. Rep. 991), 709, 712, 722, 737, 749
 Ott v. Sprague (27 Kan. 620), 284
 Ottawa Gaslight Co. v. Graham (28 Ill. 73; 39 Ill. 598; 35 Ill. 346), 651, 653, 664, 673, 758
 Ottawa Gaslight Co. v. Thompson (39 Ill. 598), 664
 Otto Township v. Wolf (106 Pa. St. 608), 789
 Ould v. Richmond (23 Gratt. 464; 14 Am. Rep. 139), 563
 Owensboro Gaslight Co. v. Hildebrand (19 Ky. L. Rep. 983; 42 S. W. Rep. 351), 577, 579, 601
 Owings v. Emery (6 Gill. 260), 285
 Oxenden v. Compton (2 Ves. 69), 279
- P
- Packer v. Noble (103 Pa. St. 188), 211
 Packham v. German Fire Ins. Co. (91 Md. 515; 46 Atl. Rep. 1066; 50 L. R. A. 828), 827
 Page v. Culver (55 Mo. App. 606), 229
 Paine v. Griffiths (86 Fed. Rep. 452; 58 U. S. App. 38; 30 C. C. A. 182), 69, 168
 Palestine Water, etc., Co. v. Palestine (91 Tex. 540; 44 S. W. Rep. 814), 520, 522, 531, 539, 540
 Palmer v. Edwards (Doug. 187), 246
 Palmer v. Larchmont, etc., Co. (*supra*), 548
 Palmer v. Truby (136 Pa. St. 556; 20 Atl. Rep. 516), 52, 140, 198, 220
 Palmer v. Uncas Mining Co. (70 Cal. 614; 11 Pac. Rep. 666), 357
 Palmer Oil & Gas Co. v. Parish (6 Kan. 611; 59 Pac. Rep. 640), 284
 Paola Gas Co. v. Paola Glass Co. (56 Kan. 614; 44 Pac. Rep. 621), 591
 Parfitt v. Ferguson (159 N. Y. 111; 53 N. E. Rep. 707, affirming 38 N. Y. Supp. 466; 3 N. Y. App. Div. 176), 457, 492
 Parfit v. Ferguson (38 N. Y. Supp. 466; 3 N. Y. App. Div. 176; 73 N. Y. St. Rep. 621, affirmed 159 N. Y. 111; 53 N. E. 707), 454, 510, 542
 Paris v. Norway Water Co. (85 Me. 330; 27 Atl. Rep. 143), 833
 Parish Fork Oil Co. v. Bridgewater Gas Co. (51 W. Va. 583; 42 S. E. Rep. 655), 79, 98, 114, 129, 145, 170, 172, 182, 197, 198, 200, 206, 207, 210, 215, 217
 Park Comrs. v. Common Council (28 Mich. 228), 489, 564
 Parker Land & Oil Co. v. Reddick (18 Ind. App. 616; 47 N. E. Rep. 848), 355, 356, 629, 644
 Parkersburg Gas Co. v. Parkersburg (30 W. Va. 435; 4 S. E. Rep. 650), 480, 488, 489, 528
 Parkin v. Wirksworth Gas Co. (26 Gas J. 946), 720, 749
 Parlin, etc., Co. v. Finfrouck (65 Ill. App. 174), 759
 Parry v. Croydon Gas Co. (15 C. B. (N. S.) 568; 11 C. B. (N. S.) 578; 10 Jur. (N. S.) 172; 9 L. T. (N. S.) 694; 12 W. R. 212), 652, 672, 676

TABLE OF CASES.

lxxxv

(References are to pages.)

- Parry v. Smith (L. R. 4 C. P. 325; 33 Gas J. 899), 682, 747, 755
- Parsell v. Stryker (41 N. Y. 480), 328
- Parsons v. District of Columbia (170 U. S. 45; 18 Sup. Ct. Rep. 521), 470
- Patterson v. Gaslight & Coke Co. ([1896] 2 Ch. 476; 65 L. J. Ch. (N. S.) 709; 74 L. T. Rep. 640), 608
- Patterson v. Hausbeck (8 Pa. Super. Ct. Rep. 36), 221
- Patterson v. Kentucky (11 Bush. 311; 21 Amer. Rep. 220), 418
- Patterson v. Kentucky (97 U. S. 501), 418
- Patterson v. People's Natural Gas Co. (172 Pa. St. 554; 26 Pittsb. L. J. (N. S.) 260; 37 W. N. C. 422; 33 Atl. Rep. 575), 392, 393
- Patterson Gaslight Co. v. Brady (27 N. J. L. 245; 72 Am. Dec. 360), 575
- Patton v. Axley (5 Jones L. (N. C.) 440), 71, 74
- Patrick v. Weston (22 Colo. 45; 43 Pac. Rep. 446), 351
- Paul v. Cragnas (25 Nev. 293; 59 Pac. Rep. 857; 60 Pac. Rep. 983; 47 L. R. A. 540), 79
- Paul v. Travelers' Ins. Co. (112 N. Y. 472; 20 N. E. Rep. 347, affirming 45 Hun 313), 828, 830
- Pearce v. Bridgewater Gas Co. (28 Pittsb. L. J. (N. S.) 171), 257
- Pearce v. Gardner ([1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518), 314
- Pearcy v. Henley (82 Ind. 129), 282
- Pearson v. Phoenix Gas Co. (12 Gas J. 69), 577, 607
- Peatman v. Centreville, etc., Co. (105 Ia. 1; 74 N. W. Rep. 689), 361
- Peck v. Trinsmaran Co. (2 Ch. Div. 115; 24 W. R. 361), 372, 377
- Peerrin v. Lepper (34 Mich. 292), 229
- Peers v. Consolidated Coal Co. (59 Ill. App. 595), 257
- Pelton v. Minah, etc., Co. (11 Mont. 281; 28 Pac. Rep. 310), 359
- Pendergast v. Turton (13 L. J. Ch. 268; 5 Jur. 1102; 8 Jur. 205), 314, 358
- Penn Gas Coal Co. v. Versailles Fuel Gas Co. (131 Pa. St. 522; 19 Atl. Rep. 933), 397
- Penn Iron Co. v. Lancaster (17 Lanc. L. Rev. 161), 604, 609, 610, 612
- Penn. Mut. Life Ins. Co. v. Thackara (10 Wkly. W. N. C. (Pa.) 104; 11 Wkly. W. N. C. 391; 13 Reporter 731), 632
- Pennington v. Brinsop Coal Co. (5 Ch. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874), 653, 674
- Pennsylvania Co. v. Langendorf (48 Ohio St. 316; 28 N. E. Rep. 172; 13 L. R. A. 190), 780
- Pennsylvania Coal Co. v. Sanderson (113 Pa. St. 126; 6 Atl. Rep. 453; 86 Pa. St. 401; 94 Pa. St. 302), 657, 661
- Pennsylvania Gas Co. v. Warren Gas Co. (3 Pa. Dist. Rep. 67), 615, 620
- Pennsylvania Globe Gas Co. v. Scranton (97 Pa. St. 538), 457, 530
- Pennsylvania Ins. Co. v. Faires (13 Tex. Civ. App. 111; 35 S. W. Rep. 55), 797, 801
- Pennsylvania Salt Co. v. Neel (54 Pa. St. 9), 77, 285
- Penny v. Rosendale, etc., Co. (14 Gas J. 927), 609
- Pennville, etc., Co. v. Thomas (21 Ind. App. 1; 51 N. E. Rep. 351), 346
- Pensacola Gas Co. v. Pebley (25 Fla. 381; 5 So. Rep. 593), 651

(References are to pages.)

- Pensacola Gas Co. v. Pensacola (33 Fla. 322; 14 So. Rep. 826), 474, 524
- Penton v. Robart (2 East. 88), 646
- People v. Assessors of Brooklyn (76 N. Y. 202; 16 Hun 196), 834
- People v. Assessors of Brooklyn (6 N. Y. Trans. App. 116), 832
- People v. Brooklyn Assessors (19 N. Y. App. Div. 599; 46 N. Y. Supp. 388), 838
- People v. Bowen (30 Barb. 24, affirmed 21 N. Y. 517), 498, 534, 540
- People v. Budd (117 N. Y. 1; 22 N. E. Rep. 682; 5 L. R. A. 559; 15 Am. St. Rep. 460), 618
- People v. Chicago Gas Trust Co. (130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; 29 Am. and Eng. Corp. Cas. 257), 420, 422, 434, 531, 576
- People v. Deehan (153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071), 443, 463, 521, 522, 524, 526, 527, 535, 538
- People v. Deehan (11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071; reversed 153 N. Y. 528; 47 N. E. Rep. 787), 536
- People v. Gilroy (67 Hun 323; 22 N. Y. Supp. 271), 518
- People v. Gleason (121 N. Y. 631; 25 N. E. Rep. 4), 455
- People v. Gold Run, etc., Co. (66 Cal. 138; 4 Pac. Rep. 1152), 654
- People v. Kent (12 Nat. Corp. Rep. (Ill.) 193), 422, 538
- People v. Kingman (24 N. Y. 559), 512
- People v. Lake Erie, etc., Co. (167 Ill. 283; 47 N. E. Rep. 518), 470
- People v. Manhattan Gas Co. (45 Barb. 136; 1 Abb. Pr. (N. S.) 404; 30 How. Pr. 87), 577, 585, 586, 607, 610
- People v. Martin (48 Hun 193), 833, 834
- People v. Mutual Gaslight Co. (38 Mich. 154), 520, 540
- People v. N. Y., etc., Co. (56 N. Y. Supp. 364), 577, 586
- People v. New York, etc., Co. (64 Barb. 55; 6 Lans. 467), 664, 672, 676
- People v. O'Brien (111 N. Y. 7; 18 N. E. Rep. 692), 522, 535
- People v. Pacheco (27 Cal. 175), 450
- People v. Rice (138 N. Y. 151; 33 N. E. Rep. 846), 842
- People v. Ridgely (21 Ill. 65), 519
- People v. San Francisco (11 Cal. 42), 471
- People v. San Francisco (54 Cal. 248), 549
- People v. Steele (56 N. Y. 664; 1 Sheldon 345), 834
- People v. Stephens (62 Cal. 209), 421
- People v. Van Rensselaer (8 Barb. 180), 251
- People v. Wilber (4 Park. Cr. Rep. 19), 843
- People v. Williams (35 Cal. 671), 42
- People's Gaslight Co. v. Amphlett (93 Ill. App. 194), 701, 723, 745, 753
- People's Gaslight & Coke Co. v. Chicago (114 Fed. Rep. 384), 428, 433, 439, 444
- People's Gaslight & Coke Co. v. Hale (94 Ill. App. 406), 428, 429, 432, 434, 436, 522, 536, 538, 577, 578, 597, 600
- People's Gas Co. v. Tyner (131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443), 32, 33, 34, 39, 45, 48, 119, 136, 775
- People's Natural Gas Co. v. Fidelity, etc., Co. (150 Pa. St. 8; 24 Atl. Rep. 339), 827

TABLE OF CASES.

lxxxvii

(References are to pages.)

- People's Natural Gas Co. v. Pittsburgh (1 Penn. C. C. Rep. 311), 483
 Peoria, etc., Ins. Co. v. Downs (90 Ky. 236; 13 S. W. Rep. 882; 12 Ky. L. Rep. 115), 823
 Pereria v. Wallace (129 Cal. 397; 62 Pac. Rep. 61), 456
 Perley v. Chandler (6 Mass. 453), 333
 Peter v. Barnes (16 Ind. 219), 112
 Pettibone v. Smith (150 Pa. St. 118; 24 Atl. Rep. 603), 340
 Pettis v. Johnson (56 Ind. 139), 514
 Petroleum Co. v. Coal, etc., Co. (89 Tenn. 381; 18 S. W. Rep. 65), 68, 90, 130, 132
 Peyton v. Texas & Pacific Ry. (41 La. Ann. 361; 6 So. Rep. 690), 780
 Pfeiffer v. Brown (165 Pa. St. 267; 30 Atl. Rep. 844), 658
 Philadelphia v. Flanigen (47 Pa. St. 21), 469
 Philadelphia v. Fox (64 Pa. St. 169), 446
 Philadelphia v. Hays (93 Pa. St. 72), 474
 Philadelphia Gas Works Co., *In re* (1 Dauph. Co. Rep. 55), 482, 483, 530
 Philadelphia Co. v. Central Traction Co. (165 Pa. St. 456; 30 Atl. Rep. 934), 755
 Philadelphia Co. v. Freeport (167 Pa. St. 27; 31 Atl. Rep. 571), 513, 515
 Philadelphia Gas Co. v. Park Bros. (138 Pa. St. 346; 22 Atl. Rep. 86), 530, 597, 599, 603
 Philbrick v. Ewing (97 Mass. 133), 636, 649
 Phillips v. Coast (130 Pa. St. 572; 18 Atl. Rep. 998), 142
 Phillips v. Vandergrift (146 Pa. St. 357; 23 Atl. Rep. 347), 183, 267
 Phoenix Gaslight, etc., Co. v. Shilits (19 Gas J. 848), 843
 Phoenix, etc., Co. v. Dethick (14 Gas J. 536), 754
 Phoenix Ins. Co. v. Erie, etc., Co. (117 U. S. 312; 6 Sup. Ct. Rep. 750, 1176), 827
 Phoenix Ins. Co. v. Flemming (65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789), 795, 818
 Phoenix Ins. Co. v. Greer (61 Ark. 509; 33 S. W. Rep. 840), 805
 Phoenix Ins. Co. v. Lawrence (4 Metc. (Ky.) 9; 31 Am. Dec. 521), 826
 Phoenix, etc., Co. v. Munger (49 S. W. Rep. (Tex. Civ. App.) 271), 801
 Phoenix Ins. Co. v. Shearman (17 Tex. Civ. App. 456; 43 S. W. Rep. 930, 1063), 797, 800
 Phoenix Ins. Co. v. Taylor (5 Minn. 492), 812
 Pickett v. Pacific, etc., Ins. Co. (144 Pa. St. 79; 22 Atl. Rep. 871), 829, 830
 Pierce v. George (108 Mass. 78), 631
 Pifer v. Brown (43 W. Va. 412; 27 S. E. Rep. 399; 49 L. R. A. 497), 82
 Pilcher v. Atchison, etc., Ry. Co. (38 Kan. 516; 16 Pac. Rep. 945), 284
 Pine Bluff, etc., Co. v. Derreuisseaux (56 Ark. 132; 19 S. W. Rep. 428), 788
 Pine Bluff, etc., Co. v. McCain (62 Ark. 118; 34 S. W. Rep. 549), 685, 692, 710, 730
 Pine Bluff, etc., Co. v. Schneider (62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366), 706, 709, 710, 712, 745, 746, 747, 750
 Pingree v. Mutual Gas Co. (107 Mich. 156; 65 N. W. Rep. 6), 604
 Pingrey v. Watkins (15 Vt. 479), 246

(References are to pages.)

- Piru Oil Co. (16 Lan. Dec. 117), 32, 55
- Pittsburg, etc., Co., *In re* (16 Pa. Co. Ct. Rep. 433), 481, 483
- Pittsburg's Appeal (115 Pa. St. 4; 7 Atl. Rep. 778), 427, 514, 525, 531, 532
- Pittsburg's Appeal (123 Pa. St. 374; 16 Atl. Rep. 621), 838
- Pittsburg, etc., Co. v. Lake Superior Iron Co. (118 Mich. 109; 76 N. W. Rep. 395), 334
- Pittsburg Carbon Co. v. Philadelphia Co. (130 Pa. St. 438; 18 Atl. Rep. 732), 459, 503, 572
- Pittsburg Gas Co. v. Pittsburg (101 U. S. 219), 474
- Pittsburg Consolidated Coal Co. v. Greenlee (164 Pa. St. 549; 30 Atl. Rep. 489), 276
- Planters', etc., Ins. Co. v. Rowland (66 Md. 236; 7 Atl. Rep. 257), 809
- Plonk v. Jessop (178 Pa. St. 71; 27 Pittsb. L. J. (N. S.) 162; 39 W. N. C. 156; 35 Atl. Rep. 851), 746
- Plummer v. Hillside, etc., Co. (160 Pa. St. 483; 28 Atl. Rep. 853), 62, 78, 150, 200, 321
- Pocatello Water Co. v. Standley (61 Pac. Rep. (Idaho) 518), 434, 542, 594, 616
- Pocock v. Brighton (31 Gas J. 429), 716, 722
- Pool v. Milwaukee, etc., Ins. Co. (91 Wis. 530; 65 N. W. Rep. 54), 808
- Poole v. Middleton (29 Beav. 646; 9 Jur. (N. S.) 1262; 4 L. T. 631; 9 W. R. 758), 352
- Pooley v. Whitmore (10 Heisk. 629; 27 Am. Rep. 733), 348
- Porquay Gas Co. v. Carter (32 Gas J. 490), 587
- Port v. Jackson (17 Johns. 239), 235
- Porter v. Noyes (47 Mich. 55; 10 N. W. Rep. 77), 163
- Portland Natural Gas Co. v. State (135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639), 576, 578, 579, 581, 585, 594, 596
- Post v. Kearney (2 N. Y. 394), 246
- Postal Telegraph & Cable Co. v. Eaton (170 Ill. 513; 49 N. E. Rep. 365), 549
- Potter v. Gilbert (177 Pa. St. 159; 35 Atl. Rep. 597; 35 L. R. A. 580), 640
- Potter v. Natural Gas Co. (183 Pa. St. 575; 39 Atl. Rep. 7), 789
- Potter v. Cromwell (40 N. Y. 287), 629
- Potterie Gas Co. v. Potterie (153 Pa. St. 10; 25 Atl. Rep. 1107; 179 Pa. St. 68; 36 Atl. Rep. 232), 200, 210
- Poterie Gas Co. v. Poterie (179 Pa. St. 68; 36 Atl. Rep. 232), 120, 254
- Pottstown Gas Co. v. Murphy (39 Pa. St. 257), 651, 664, 666, 667, 672
- Poughkeepsie Gas Co. v. Citizens' Gas Co. (20 Hun 214), 616, 637
- Powell v. Aikin (4 K. & J. 343), 49
- Powell v. Elliott (L. R. 10 Ch. App. 424; 33 L. T. 110; 23 W. R. 777), 319
- Powell v. Lantzy (173 Pa. St. 543; 34 Atl. Rep. 450), 78, 840
- Powell v. Thomas (6 Ha. 306), 315
- Powell Duffryn Coal Co. v. Taff Vale Rail Co. (L. R. 9 Ch. App. 331; 43 L. J. Ch. 575; 30 L. T. 208), 318
- Power v. Athens (99 N. Y. 592; 2 N. E. Rep. 609), 496
- Powers v. Boston Gaslight Co. (158 Mass. 257; 33 N. E. Rep. 523), 710, 719, 756

(References are to pages.)

- Prattle v. Hornibrook ([1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123), 316
- Preston v. Hayton, etc., Gas Co. (25 Gas J. 889), 605, 620, 623
- Prentice v. Janssen (79 N. Y. 478), 308
- Presidio Mining Co. v. Bullis (68 Tex. 581; 4 S. W. Rep. 860), 87, 93, 284
- Price v. Griffith (DeG. M. & G. 80; 21 L. J. Ch. 78; 15 Jur. 1093; 18 L. T. (O. S.) 190), 318
- Price v. Malott (85 Ind. 266), 630
- Price v. South, etc., Gas Co. (65 L. J. Q. B. 126; 12 T. L. R. 31), 718
- Prichard v. Consolidated Gas Co. (2 Pa. Super. Ct. 179; 39 W. N. C. 28), 766
- Priddy v. Griffith (150 Ill. 560; 37 N. E. Rep. 999), 287, 288; 289
- Pritchard v. Consolidated Gas Co. (2 Pa. Super. Ct. 179; 39 W. N. C. 28), 706
- Providence Gas Co. v. Thurber (2 R. I. 15; 55 Am. Dec. 621), 520, 548, 833
- Pryor, *In re* (55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398; 49 Am. St. Rep. 280; 12 Am. R. and Corp. Rep. 364), 421, 424, 460
- Pudsey Coal Gas Co. v. Bradford (L. R. 15 Eq. 167; 21 W. R. 286; 42 L. J. Ch. 293; 22 Gas J. 54), 576
- Pullman v. Mayor (49 Barb. 57), 469
- Pullman Palace Car Co. v. Laack (143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215, affirming 41 Ill. App. 34), 693, 721, 736, 775
- Putnam v. Commonwealth Ins. Co. (4 Fed. Rep. 753), 798
- Putnam Insurance Co. (18 Blatchf. 368; 4 Fed. Rep. 753), 813
- Q
- Quarryville Water Co. v. Fritz (14 Lanc. L. Rev. 186), 395
- Queen v. Firth (L. R. 1 Crown Cas. Res. 172), 843
- Queen City, etc., Co. v. Gibson House Co. (4 Ohio N. P. 119; 6 Ohio Dec. 148), 614
- Queen's Ins. Co. v. Harris (2 Wkly. N. C. (Pa.) 220), 823
- Queen Ins. Co. v. Sinclair (1 Ohio Cir. Ct. Rep. 496), 796
- Quincy v. Bull (106 Ill. 337; 4 Am. and Eng. Corp. Cas. 554), 548
- Quinn v. Quinn (81 Cal. 14; 22 Pac. Rep. 264), 339
- R
- Railroad Co. v. Railroad Co. (32 Barb. 358, 364), 522
- Railroad Co. v. Sanderson (109 Pa. St. 583), 369
- Rainey v. Frick Coke Co. (73 Fed. Rep. 389), 298
- Ramsey v. White (21 Pittsb. L. J. (N. S.) 425), 187
- Ranck v. Cedar Rapids Gas Co. (116 Ia. —; 89 N. W. Rep. 88), 729, 730
- Rand v. Venture Oil Co. (48 Fed. Rep. 248), 397
- Randall v. Merideth (76 Tex. 669; 13 S. W. Rep. 576), 340, 348
- Ransberry v. Kellar (9 Pa. Co. Ct. Rep. 299), 515
- Rankin's Appeal (1 Mong. (Pa.) 308; 2 L. R. A. 429), 290, 294
- Rapson v. Cubitt (9 Mess. & Wels. 710; C. & M. 64), 754
- Rara Avis' Gold & Silver Mining Co. v. Bouscher (9 Colo. 385; 12 Pac. Rep. 433), 357
- Ratsberry v. Keller (9 Pa. Co. Ct. Rep. 299), 513
- Rau v. Winchester Fire Ins. Co. (36 N. Y. App. Div. 179; 55 N. Y. Supp. 459), 814

TABLE OF CASES.

(References are to pages.)

- Rawlings v. New Memphis, etc., Co. (105 Tenn. 268; 60 S. W. Rep. 206), 361, 363
- Ray v. Natural Gas Co. (138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290), 121, 166, 168, 185, 187, 188, 222
- Ray v. Western, etc., Gas Co. (138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; 27 W. N. C. 230), 183, 193, 224, 266
- Raymond v. Johnson (17 Wash. 232; 49 Pac. Rep. 492), 83
- Raynolds v. Hanna (55 Fed. Rep. 783), 76
- Read v. Beck (66 Ia. 21; 23 N. W. Rep. 159), 162
- Reading v. Consumers' Gas Co. (2 Del. Co. Rep. (Pa.) 437), 531
- Reagan v. Farmers' Loan, etc., Co. (154 U. S. 362), 431
- Reaper City Ins. Co. v. Jones (62 Ill. 458), 822
- Redlands Domestic Water Co. v. Redlands (120 Cal. 312; 53 Pac. Rep. 843), 432
- Red Star S. S. Co. v. Jersey City (45 N. J. L. 246), 619
- Reed v. Reed (16 N. J. Eq. 248), 287
- Reeve v. Whitmore (33 L. J. Ch. 63), 646
- Reeves v. Corning (51 Fed. Rep. 74), 174
- Regina v. Birmingham Gas Co. (1 B. & C. 506), 649
- Regina v. Brighton Gas Co. (5 B. & C. 466), 649
- Regina v. Colne Valley Gas Co. (29 Gas J. 498, 781; 30 Gas. J. 218), 543
- Regina v. Inhabitants of Lee (L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S. 704; 14 W. R. 311), 632, 633
- Regina v. Jenkins (5 Gas J. 214), 843
- Regina v. Lee (L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S.) 704; 14 W. R. 311), 833
- Regina v. Longton Gas Co. (2 Ell. & Ell. 651; 2 L. T. (N. S. 14; 8 Cox C. C. 317; 29 L. J. M. C. 118; 8 Gas J. 165; 9 Gas J. 114; 6 Jur. (N. S.) 601; 8 W. R. 293), 543
- Regina v. Mile End Old Town (10 Q. B. 208; 3 New Sess. Cas. 13; 16 L. J. M. C. 184; 11 Jur. 985), 833
- Regina v. Mitchell (22 Gas J. 137), 843
- Regina v. Rockdale W. W. Co. (1 M. & S. 634), 649
- Regina v. Sheffield Consolidated Gaslight Co. (32 L. J. M. C. 169; 4 B. & S. 135; 9 Jur. (N. S.) 623; 8 L. T. (N. S.) 692; 11 W. R. 1064), 833
- Regina v. Sheffield Gas Consumers' Co. (18 Jur. 146, note), 542
- Regina v. West Middlesex Water Works Co. (1 E. & E. 716; 28 L. J. M. C. 135; 5 Jur. (N. S.) 1159), 699, 833
- Regina v. White (20 E. L. & Eq. 585; 17 Jur. 536; 3 C. & K. 363; 6 Cox Cr. Cas. 213; Dears. C. C. 203; 22 L. J. (N. S.) 123), 843
- Reid v. Parsons (2 Chit. 247), 180
- Reiss v. Stearn Co. (128 N. Y. 103; 28 N. E. Rep. 24), 701, 702
- Renshaw v. Missouri, etc., Ins. Co. (33 Mo. App. 394; 103 Mo. 595; 15 S. W. Rep. 945), 803
- Renshaw v. Missouri, etc., Ins. Co. (103 Mo. 595; 15 S. W. Rep. 945; 23 Am. St. Rep. 204), 812, 815
- Rex v. Medley (6 C. & P. 292), 652, 654, 658, 667, 676
- Reynolds v. Cook (83 Va. 817; 13 S. L. Rep. 710), 106

TABLE OF CASES.

xci

(References are to pages.)

- Reynolds v. Hanna** (55 Fed. Rep. 783), 290, 291
Rhea v. Tathem (1 Jones Eq. 290), 310
Rhea v. Vannoy (1 Jones Eq. 282), 310
Rhoades v. Patrick (27 Pa. St. 323), 42
Rhodes v. Thomas (2 Ind. 638), 172
Ricard v. Sanderson (41 N. Y. 179), 102
Rice v. Ege (42 Fed. Rep. 661), 48, 102, 134
Richards v. Dover (N. J. L.) (39 Atl. Rep. 705), 842
Richards v. Killam (10 Mass. 239), 277
Richards v. Protection Ins. Co. (30 Mo. 273), 807
Richardson Ins. Co. (46 Fed. Rep. 843), 830
Richmond Gas Co., *In re* ([1893] 1 Q. B. 56; 62 L. J. Q. B. 172; 67 L. T. 554; 41 W. R. 41; 56 J. P.), 461, 591
Richmond County Gaslight Co. v. Middletown (59 N. Y. 228, affirming 1 T. & C. 143), 420, 422, 446, 471, 489, 585
Richmond Gas Co. v. Baker (146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683), 712, 714, 721, 736, 737, 744
Richmond Mfg. Co. v. Atlantic De-Lain Co. (10 R. I. 106), 653
Richmond Natural Gas Co. v. Clawson (155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744), 597, 603, 604
Richmond Natural Gas Co. v. Enterprise Natural Gas Co. (66 N. E. Rep. (Ind. App.) 782), 42, 44, 45, 47, 117, 119, 414
Ricketts v. Bell (1 DeG. & Sm. 335; 10 L. T. 105; 11 Jur. 918), 318, 319
Ricketts v. Bennett (4 C. B. 686; 17 L. J. (N. S.) C. P. 17; 11 Jur. 1062), 348
Rico, etc., Co. v. Musgrave (14 Colo. 79; 23 Pac. Rep. 458), 353, 362
Riddle v. Mellon (147 Pa. St. 30; 23 Atl. Rep. 241), 150, 161, 192
Rideout v. Knox (148 Mass. 368; 19 N. E. Rep. 390), 48
Ridgeway Light, etc., Co. v. Elk Co. (191 Pa. St. 465; 43 Atl. Rep. 323), 838, 839
Rieker v. Lancaster (7 Pa. Super. Ct. 149; 42 W. N. C. 160), 599
Rienker v. Lancaster (14 Lanc. L. Rev. 393), 483, 573, 580, 581
Riggan v. Green (80 N. C. 236), 280
Ritchie v. McAllister (14 Pa. Co. Ct. Rep. 267), 641, 644
Rivara v. Queens Ins. Co. (62 Miss. 720), 822
Rjverton, etc., Co. v. Haig (58 N. J. L. 295; 33 Atl. Rep. 215), 833
Roanoke Gas Co. v. Roanoke (88 Va. 810; 14 S. E. Rep. 665), 542
Robb v. Carnegie (145 Pa. St. 324; 22 Atl. Rep. 649; 14 L. R. A. 329), 663, 664
Roberts v. Bettman (45 W. Va. 143; 30 S. E. Rep. 95), 187, 265, 267
Roberts v. Davey (4 Barn. & Ad. 664; 1 Nev. & M. 443), 182
Roberts v. Eberhart (1 Kay 148; 23 L. J. Ch. 201; 22 L. T. 253; 2 W. R. 125), 349
Roberts v. Jepson (4 L. D. 60), 32, 55
Roberts v. McFaddin (74 S. W. Rep. (Tex. Civ. App.) 105), 71
Robert v. Sadler (104 N. Y. 229; 10 N. E. Rep. 428), 333
Robertson v. Jones (71 Ill. 405), 49
Robbins v. Gaffey (48 Leg. Int. 462), 397
Robinson, *In re* (28 Tex. App. 511; 13 S. W. Rep. 786), 418

(References are to pages.)

- Robinson v. Coal Co. (50 Cal. 460), 654
- Robinson v. Hurman (1 Exch. 850; 18 L. J. Exch. 202), 320
- Robinson v. Imperial, etc., Co. (15 Gas. J. 883), 789
- Roche v. Milwaukee Gaslight Co. (5 Wis. 55), 473
- Rockebrandt v. Madison (9 Ind. App. 227; 36 N. E. Rep. 444), 560
- Rockford Gaslight, etc., Co. v. Ernst (68 Ill. App. 300), 687, 703, 706, 709, 710, 717, 729
- Rockland Water Co. v. Camden, etc., Water Co. (80 Me. 544; 15 Atl. Rep. 785), 490
- Rockwell v. Morgan (2 Beas. (N. J. Ct.) 384), 295
- Roe v. Columbus, etc., Ins. Co. (17 Mo. 301), 805
- Roehl v. Hannesser (114 Ind. 311; 15 N. E. Rep. 345), 95
- Rogers, *In re* (4 Land Dec. 284), 55
- Rogers v. Cox (96 Ind. 157), 630
- Rogers v. Crow (40 Mo. 91; 93 Am. Dec. 299), 632
- Rogers v. Eagle Fire Co. (9 Wend. 611, 618), 102
- Rogers v. Humphreys (4 Ad. & El. 299), 367
- Rogers v. Prattville Mfg. Co. (81 Ala. 483; 1 So. Rep. 643), 636
- Rogers Park Water Co. v. Fergus (178 Ill. 571; 53 N. E. Rep. 363), 433, 436
- Rogers Park Water Co. v. Fergus (180 U. S. 624; 21 S. Ct. Rep. 490, affirming 178 Ill. 571; 53 N. E. Rep. 563), 439, 444
- Rollins v. Riley (44 N. H. 9), 199
- Rover Iron Co. v. Trout (83 Va. 397; 2 S. E. Rep. 713), 70, 146, 166
- Rose v. Stephens, etc., Transportation Co. (11 Fed. Rep. 438; 20 Blatchf. 417), 701, 702
- Rosenheimer v. Standard Gaslight Co. (36 N. Y. App. Div. 1; 55 N. Y. Supp. 192), 664, 672
- Rosenquist v. Canary (15 N. Y. Misc. 148; 36 N. Y. Supp. 979; 72 N. Y. St. Rep. 422), 211
- Roseville Alta Mining Co. v. Iowa Gulch Mining Co. (15 Colo. 29; 24 Pac. Rep. 920), 642, 644
- Ross v. Campbell (9 Colo. App. 38; 47 Pac. Rep. 465), 638
- Ross v. Schneider (30 Ind. 423), 112
- Rossiter v. Miller (3 App. Cas. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865), 314, 316
- Routledge v. Grant (4 Bing. 680), 316
- Rowe v. Wood (1 J. & W. 555), 371, 372, 374, 377
- Rowell v. Bodfish (10 Atl. Rep. (Me.) 448), 76
- Ruffatti v. Societe, etc. (10 Utah 386; 37 Pac. Rep. 591), 79
- Rushville Gas Co. v. Rushville (121 Ind. 206; 23 N. E. Rep. 72), 560
- Rushville v. Rushville Natural Gas Co. (132 Ind. 575; 28 N. E. Rep. 853; 15 L. R. A. 321; 43 Am. & Eng. Corp. Cas. 483), 427, 488
- Russell v. Manufacturer's, etc., Ins. Co. (50 Min. 409; 52 N. W. Rep. 906), 795, 819
- Russell v. Stratton (201 Pa. St. 277; 50 Atl. Rep. 975), 166
- Russen v. Wanser (53 Md. 92), 367
- Rutland v. Gie (1 Sid. 152; 1 Lev. 107), 287
- Ryall v. Rolle (1 Atk. 175), 638, 648
- Ryckman v. Gillis (6 Lans. 79), 328
- Rylands v. Fletcher (L. R. 3 H. L. 330), 685
- Rynd v. Rynd Farm Oil Co. (63 Pa. St. 397), 81, 82, 216

S

- Sackett v. New Albany (88 Ind. 473; 45 Am. Rep. 467), 450

TABLE OF CASES.

xciii

(References are to pages.)

- Saginaw Gaslight Co. v. Saginaw (28 Fed. Rep. 529), 488, 489, 505, 528
- Sale v. Lambett (L. R. 18 Eq. 1; 43 L. J. Ch. 470; 22 W. R. 478), 314
- Saltsburg Gas Co. v. Saltsburg (138 Pa. St. 250; 27 W. N. C. 120; 20 Atl. Rep. 844; 10 L. R. A. 193), 467, 472, 609
- Sampson v. Grogan (21 R. I. 174; 42 Atl. Rep. 712; 44 L. R. A. 711), 290
- Samuel v. Cardiff Gas Co. (18 Gas J. 192), 601
- Sanders v. Rowe (48 S. W. Rep. (Ky.) 1083; 20 Ky. L. Rep. 1082), 140
- Sanders v. Sharp (153 Pa. St. 555; 25 Atl. Rep. 524), 171, 184, 226, 245
- Sanderson v. Scranton (105 Pa. St. 469), 62, 77, 839
- Sands v. Hughes (53 N. Y. 287), 246
- Sandy Lake v. Sandy Lake, etc., Co. (16 Pa. Super. Ct. 234), 460, 464, 502, 520, 522, 523, 528, 531
- San Diego Water Co. v. San Diego (118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; 62 Am. St. Rep. 261), 429, 430, 432, 433
- San Diego, etc., Co. v. Jasper (110 Fed. Rep. 702), 428
- San Diego, etc., Co. v. Jasper (111 Fed. Rep. 702), 429
- San Diego Land Co. v. National City (174 U. S. 739, affirming 74 Fed. Rep. 79), 430, 431, 433
- San Francisco Gas Co. v. San Francisco (6 Cal. 190), 457
- San Francisco Gas Co. v. San Francisco (9 Cal. 453), 446, 462
- San Francisco Gas Co. v. Brickwedel (62 Cal. 641), 469
- San Joaquin, etc., Co. v. Stanislaus County (113 Fed. Rep. 930), 428
- San Jose v. January (57 Cal. 614), 834, 838
- San Luis Water Co. v. Estrada (117 Cal. 168; 48 Pac. Rep. 1075), 459, 527
- Santa Clara, etc., Assn. v. Quick Silver Mining Co. (17 Fed. Rep. 657), 341
- Santa Ana Water Co. v. San Buenaventura (56 Fed. Rep. 339), 422
- Sargent v. Robertson (17 Ind. App. 411; 46 N. E. Rep. 925), 101, 274
- Satterfield v. Rowan (83 Ga. 187; 9 S. E. Rep. 677), 654
- Sattler v. Opperman (30 Pittsb. L. J. (N. S.) 205), 640, 644
- Sauvage v. English Gas Co. of Paris (4 Gas J. 136), 749
- Sayers v. Hoskinson (110 Pa. St. 473; 1 St. Rep. 308), 287, 294
- Schaum v. Equitable Gaslight Co. (15 N. Y. App. Div. 74; 44 N. Y. Supp. 284), 698
- Schaupp v. Hukill (34 W. Va. 375; 12 S. E. Rep. 501), 193, 201
- Scheizer v. Mansfield (14 Colo. App. 236; 59 Pac. Rep. 843), 359
- Schenck v. Olyphant (181 Pa. St. 191; 37 Atl. Rep. 258), 559
- Schendell v. Rogan (94 Tex. 585; 63 S. W. Rep. 1001), 335
- Schermerhorn v. Metropolitan Gaslight Co. (5 Daly 144), 692, 717, 734, 747
- Schmeer v. Gaslight Co. (147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653, reversing 65 Hun 378; 26 N. Y. Supp. 1128; 20 N. Y. Supp. 168), 577, 584, 585, 624, 733, 736, 742, 765
- Schmidt v. Gillen (41 N. Y. App. Div. 302; 58 N. Y. Supp. 458), 791
- Schooley v. Butler Mining Co. (9 Kulp. (Pa.) 291), 109
- Schumaker v. Sibert (18 Kan. 104), 102
- Schuylkill Co. v. Citizens' Gas Co. (148 Pa. St. 162; 23 Atl. Rep. 1055), 838, 839

(References are to pages.)

- Schwede v. Heinrich, etc., Co. (29 Wash. —; 69 Pac. Rep. 362), 443, 514, 515, 516
- Scott v. Davenport (34 Ia. 208), 468
- Scott v. Fritz (51 Pa. St. 418), 367
- Scott v. Manchester (2 H. & N. 204; 26 L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598), 788
- Scott v. Mayor, etc., of Manchester (37 Eng. L. & Eq. 495; 2 H. & N. 204; 26 L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598), 722
- Scott v. Standard Oil Co. (106 Ala. 475; 19 So. Rep. 71; 31 L. R. A. 374), 844
- Scottish, etc., Co. v. Toronto (24 Ont. App. 208), 539
- Scranton Electric Light & Heat Co. v. Scranton, etc., Co. (3 Pa. Co. Ct. Rep. 628), 501
- Scripture v. Lowell, etc., Ins. Co. (10 Cush. 356), 803
- Sculcoates Union v. Hull Dock Co. ([1895] App. Cas. 137; 64 L. J. M. C. 49; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612; 11 R. 74), 833
- Seager v. McCable (92 Mich. 186; 52 N. W. Rep. 299; 16 L. R. A. 247), 287, 291
- Seeger v. Pettit (77 Pa. St. 437), 638
- Searle v. Abraham (73 Ia. 507; 35 N. W. Rep. 612), 456
- Seavey v. Drake (62 N. H. 393), 315
- Second National Bank v. O. E. Merrill Co. (69 Wis. 501; 34 N. W. Rep. 514), 639
- Seiders, etc., Co. v. Lewis (7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80), 644
- Seiders, etc., Works v. Lewis, etc., Co. (7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80), 356
- Selby v. Crystal, etc., Gas Co. (30 Beav. 606; 11 Gas J. 798; 6 L. T. R. 790), 391
- Selby v. Crystal, etc., Co. (4 DeG. F. & J. 246; 31 L. J. Ch. 595; 8 Jur. (N. S.) 830; 6 L. T. (N. S.) 790; 10 W. R. 636), 537
- Seton v. Slade (7 Ves. 274), 314
- Settembre v. Putnam (30 Cal. 490), 342
- Sewell v. Angerstein (18 L. T. (N. S.) 300), 634
- Seward v. Liberty (142 Ind. 551; 42 N. E. Rep. 39), 446, 466, 468
- Sewickley v. Ohio Valley Gas Co. (154 Pa. St. 539; 25 Atl. Rep. 868), 612
- Sewickley v. Ohio Valley Gas Co. (6 Pa. Co. Ct. Rep. 99; 1 Monaghan 97), 523
- Sewickley School District v. Ohio Valley Gas Co. (154 Pa. St. 539; 25 Atl. Rep. 868), 424
- Shardlow v. Cotterell (20 Ch. Div. 90; 51 L. J. Ch. 353; 45 L. T. 572; 30 W. R. 143), 313
- Sharp v. Behr (117 Fed. Rep. 864), 107, 122, 123
- Sharp v. South Omaha (53 Neb. 700; 74 N. W. Rep. 76), 513, 522, 534
- Shattuck v. Lovejoy (8 Gray 204), 247
- Shaw v. Jones (6 Ohio Dec. 453; 4 Ohio N. P. 372), 570
- Shaw v. Lenke (1 Daly 487), 632
- Shaw v. McGregor (105 Mass. 96), 348
- Shaw v. Partridge (17 Vt. 626), 171, 245
- Shaw v. Wallace (25 N. J. L. 453), 74, 235
- Sheafe v. People (87 Ill. 189; 29 Am. Rep. 49), 512
- Sheaffer v. Sheaffer (37 Pa. 525), 180
- Sheehy v. Muskerry (1 H. L. Cas. 576; 7 Cl. & F. 1; 1 Macl. & R. 493; Ll. & Gt. Plunk 568), 373, 379

TABLE OF CASES.

xcv

(References are to pages.)

- Sheets v. Allen** (80 Pa. St. 47), 74
Sheffield v. Sheffield, etc. Co. ([1898]
 1 Ch. 203; 77 Law T. Rep. 616;
 67 L. J. Ch. (N. S.) 113), 567,
 568
Sheffield United Gas Co. v. Sheffield
 (4 B. & S. 135), 649
Sheffield United Gas Co. v. Sheffield
Consumers' Co. (2 Gas J. 360),
 490
Sheffield W. W. Co. v. Bingham (L.
 R. 25 Ch. Div. 443; 48 L. T. 604;
 52 L. J. Ch. 624; 36 Gas J. 769),
 618, 619
Sheffield W. W. Co. v. Brooks (8
 Q. B. Div. 632; 51 L. J. M. C.
 97; 30 W. R. 889; 46 J. P. 548),
 588, 600
Sheffield W. W. Co. v. Carter (L. R.
 2 S. B. 632; 51 L. J. M. C. 97; 30
 W. R. 889; 46 J. P. 548), 618,
 619
Sheffield W. W. Co. v. Wilkinson
 (4 C. P. Div. 410), 588, 607
Shelbyville Water Co. v. People
 (140 Ill. 545; 30 N. E. Rep. 678;
 16 L. R. A. 505), 832
Sheller v. Shivers (171 Pa. St. 569;
 33 Atl. Rep. 95), 152, 221, 629,
 643
Shenandoah Land, etc., Co. v. Hise
 (92 Va. 238; 28 S. E. Rep. 303),
 62, 151
Shepard v. Milwaukee Gaslight Co.
 (15 Wis. 318; 82 Am. Dec. 679),
 579, 589, 590, 596
Shephard v. Milwaukee Gaslight Co.
 (6 Wis. 539; 70 Am. Dec. 479),
 577, 581, 584, 585, 592, 593, 594,
 595, 596, 601, 621
Shepher v. McCalmont Oil Co. (38
 Hun 37), 42, 63, 190
Shepherd v. Wilwaukee Gaslight Co.
 (11 Wis. 234; 15 Wis. 318; 82
 Am. Dec. 679; 6 Wis. 539), 577,
 593, 594, 596
Sherman v. Fall River Works Co.
 (5 Allen 213), 651, 674, 682, 695
Sherman v. Fall River Iron Works
 (2 Allen 524; 79 Am. Dec. 799),
 667, 672, 673, 737, 753
Shettler v. Hartman (1 Pennyp.
 (Pa.) 279), 183
Sheward v. Citizens' Water Co. (90
 Cal. 635; 27 Pac. Rep. 439), 604
Shiras v. Ewing (48 Kan. 170; 29
 Pac. Rep. 220), 593, 594, 595, 607
Shireff v. Wilks (1 East 48), 351
Shoenberger v. Equitable Gas Co.
 (22 Pittsb. L. J. (N. S.) 347),
 591
Shonberger v. Lyon (7 M. & S. 184),
 329
Shoemaker's Appeal (106 Pa. St.
 392), 288, 290, 294
Sholts Iron Co. v. Inglis (L. R. 7
 App. Cas. 518), 662
Short v. Miller (120 Pa. St. 470;
 14 Atl. Rep. 374), 355, 364
Shuter v. Philadelphia (3 Phila.
 228; 15 Leg. Int. 333), 651, 722
Sicardi v. Keystone Oil Co. (149
 Pa. St. 139; 24 Atl. Rep. 161,
 163), 361, 364
Sickles v. MacLatter Gaslight Co.
 (66 How. Fr. 304, 314; 64 How.
 Pr. 33), 609, 612, 623
Siebrecht v. East River Gas Co. (21
 N. Y. App. 110; 47 N. Y. Supp.
 262), 698, 706, 707, 710, 715, 716,
 717, 723, 729, 761
Siler v. Globe Window Glass Co. (21
 Ohio Cir. Ct. Rep. 284; 11 Ohio
 C. D. 784), 221, 642
Silkman v. Yonkers Water Comrs.
 (152 N. Y. 327; 46 N. E. Rep.
 612; 37 L. R. A. 827), 599
Sillingford v. Good (95 Pa. St. 25),
 277
Silsby v. Trotter (29 N. J. Eq. 228),
 105
Silva v. Rankin (80 Ga. 79; 4 S. E.
 Rep. 756), 83
Simon v. Northwestern, etc., Co. (12
 Ohio C. C. Rep. 170; 5 Ohio Cir.
 Dec. 456), 113, 165

TABLE OF CASES.

(References are to pages.)

- Simmons v. Buckeye Supply Co. (21 Ohio Cir. Ct. Rep. 455; 11 Ohio C. D. 690), 260, 283
 Simons v. Vulcan Oil, etc., Co. (61 Pa. St. 202), 310, 312
 Simons v. Van Inger (86 Pa. St. 330), 224, 226
 Simpson v. Pittsburgh, etc., Co. (28 Ind. App. 343; 62 N. E. Rep. 753), 62, 86, 95, 270
 Sime v. Brittain (4 B. & A. 375; 2 N. & M. 594), 348
 Sims v. Mutual, etc., Ins. Co. (101 Wis. 586; 77 N. W. Rep. 908), 827
 Sisson v. Hibbard (75 N. Y. 542), 631
 Skaneateles W. W. Co. v. Skaneateles (161 N. Y. 154; 55 N. E. Rep. 562, affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115), 491, 497, 502
 Skillman v. Lachman (23 Cal. 199), 340, 348
 Skoagland v. St. Paul Gaslight Co. (93 N. W. Rep. (Minn.) 668), 724, 758
 Skym v. Weske, etc., Co. (47 Pac. Rep. (Cal.) 110), 354
 Slater v. Haas (15 Colo. 574; 25 Pac. Rep. 1089), 345
 Slee v. Manhattan Co. (1 Paige Ch. 48), 366
 Sloan v. Furness (29 Ohio St. 568), 329
 Small v. Attwood (6 Cl. & F. 232; 2 L. J. Exch. 1; 1 Younge 407), 319
 Smallhouse v. Kentucky, etc., Co. (2 Mont. 443), 359
 Smiley v. Citizens', etc., Ins. Co. (14 W. Va. 33), 805
 Smiley v. McLauthlin (138 Mass. 363), 277
 Smiley v. Western, etc., Gas Co. (27 W. N. C. 238), 183
 Smiley v. Western, etc., Co. (138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 1), 161, 267
 Smith, *In re* (L. R. 10 Ch. App. 79; 23 W. R. 297), 279
 Smith's Appeal (69 Pa. St. 474), 91
 Smith v. Boston Gaslight Co. (129 Mass. 318), 686, 697, 702, 707, 713, 715, 723, 731, 750, 758
 Smith v. Brinker (17 Mo. 148), 238
 Smith v. Capitol Gas Co. (132 Cal. 209; 64 Pac. Rep. 258), 577, 586, 607, 627
 Smith v. Citizens', etc., Co. (5 W. N. C. 97), 845
 Smith v. Commonwealth (14 Bush. (Ky.) 31; 29 Am. Rep. 402), 633
 Smith v. Cooley (65 Cal. 46; 2 Pac. Rep. 880), 51, 299, 342, 344
 Smith v. German Ins. Co. (107 Mich. 270; 65 N. W. Rep. 236), 811, 820
 Smith v. Goldsboro (121 N. C. 350; 28 S. E. Rep. 479), 548
 Smith v. Harrison (42 Ohio St. 180), 233
 Smith v. Holloway (124 Ind. 329; 24 N. E. Rep. 886), 333
 Smith v. Jeyes (4 Beav. 503), 338, 339
 Smith v. Jones (21 Utah 270; 60 Pac. Rep. 1104), 81
 Smith v. Lincoln (170 Mass. 488; 49 N. E. Rep. 640), 514
 Smith v. London Gas Co. (7 Grant (N. C.) 112), 612
 Smith v. Metropolitan Gaslight Co. (12 How. Pr. 187), 516
 Smith v. Miller (49 N. J. L. 521; 13 Atl. Rep. 39), 182
 Smith v. Munhall (139 Pa. St. 253; 21 Atl. Rep. 735), 169, 262
 Smith v. Nashville (88 Tenn. 464; 12 S. W. Rep. 924), 561
 Smith v. Pawtucket Gas Co. (25 R. S. —; 52 Atl. Rep. 1078), 707, 728

TABLE OF CASES.

xcvii

(References are to pages.)

- Smith v. Rome (19 Ga. 89), 333
- Smith v. Scranton Gas & Water Co. (5 Lack. Leg. N. 235), 607, 610
- Smith v. Westerly (19 R. I. 437; 35 Atl. Rep. 526), 488, 491, 499
- Smyth v. Ames (109 U. S. 524), 431
- Smyth v. Sturges (108 N. Y. 495; 15 N. E. Rep. 544, affirming 30 Hun 89), 635, 636
- Snell's Case (I. R. 5 Ch. App. 22), 352
- Snoddy v. Bolen (122 Mo. 479; 24 S. W. Rep. 142; 25 S. E. Rep. 932), 83, 329, 334
- Snodgrass v. South Penn Oil Co. (47 W. Va. 509; 35 S. E. Rep. 820), 90, 115, 188, 265
- Snow v. Nelson (113 Fed. Rep. 353), 90
- Snyder v. Burnham (77 Mo. 52), 339
- Snyder v. Dwelling House Ins. Co. (59 N. J. L. 544; 37 Atl. Rep. 1022, reversing 34 Atl. Rep. 931), 801, 811
- Socala v. Chess Carley Co. (30 La. Ann. 344; 1 So. Rep. 824), 778
- Somerset v. Smith (20 Ky. Law Rep. 1488; 49 S. W. Rep. 456), 453
- Soule v. San Francisco (54 Cal. 241), 549
- South Heton Coal Co. v. Haswell Coal Co. ([1898] 1 Ch. 465; 67 L. J. Ch. 238; 78 L. T. 366; 46 W. R. 355), 316
- South Penn Oil Co. v. McIntire (44 W. Va. 296; 28 S. E. Rep. 922), 51, 72, 280
- South Penn Oil Co. v. Stone (57 S. E. Rep. (W. Va.) 374), 103, 191
- South Side Gas Co. v. Southern Illuminating Co. (18 Pa. Co. Ct. 529), 483, 528
- Southerland v. Heathcote ([1892] Ch. 504), 105
- Southern Illuminating Co., *In re* (5 Pa. Dist. 781), 459, 482, 483, 527
- Southern Oil, Langabough v. Anderson (22 Ohio Cir. C. Rep. 178; 12 Ohio C. D. 341), 682
- Southwestern, etc., Co. v. Joplin (113 Fed. Rep. 817), 454, 462, 420, 497, 499, 538
- Southern Oil Co. v. Wilson (22 Tex. Civ. App. 534; 56 S. W. Rep. 429), 169, 217
- Sparks v. Pittsburgh Co. (159 Pa. St. 295; 28 Atl. Rep. 152), 143
- Spratt v. South Metropolitan Gas Co. (7 Gas J. 663), 576, 602
- Spaulding v. Hallenbeck (35 N. Y. 204), 102
- Spaulding v. Peabody (153 Mass. 129; 26 N. E. Rep. 421; 10 L. R. A. 397), 562
- Spencer v. Austin (38 Vt. 258), 251
- Sperry v. Insurance Co. (22 Fed. Rep. 516), 796
- Sperry v. Springfield, etc., Ins. Co. (26 Fed. Rep. 234; 15 Ins. L. Jr. 270), 800, 810
- Spilman v. Parkersburg (35 W. Va. 605; 14 S. E. Rep. 279), 450, 567
- Springer v. Citizens', etc., Gas Co. (145 Pa. St. 430; 22 Atl. Rep. 986), 131, 183, 186, 222, 232, 271
- Springer v. Gas Co. (145 Pa. St. 430; 22 Atl. Rep. 986), 109
- Springer v. National Gas Co. (145 Pa. St. 430; 22 Atl. Rep. 986), 212
- Springfield v. Edwards (34 Ill. 626), 451
- Springfield Foundry, etc., Co. v. Cole (130 Mo. 1; 31 S. W. Rep. 922, reversing 57 Mo. App. 11), 63, 359
- Springfield, etc., Co. v. Cole (130 Mo. 1; 31 S. W. Rep. 922), 75, 640
- Spring Brook, etc., Co. v. Schadt Co. (3 Lack. L. News 170), 838

(References are to pages.)

- Spring Valley Water Works Co. v. Barber (99 Cal. 36; 33 Pac. Rep. 735; 21 L. R. A. 416), 838
- Spring Valley W. W. v. Bartlett (63 Cal. 245), 432
- Spring Valley W. W. v. Bartlett (16 Fed. Rep. 615), 443
- Spring Valley W. W. v. Bryant (52 Cal. 132), 431
- Spring Valley W. W. v. San Francisco (61 Cal. 3), 443
- Spring Valley W. W. v. San Francisco (82 Cal. 286; 22 Pac. Rep. 910, 1046; 6 L. R. A. 756; 16 Am. St. Rep. 116), 428, 431, 432, 618, 626
- Spring Valley W. W. Co. v. San Francisco (110 U. S. 353; 4 Sup. Ct. Rep. 48), 618, 619
- Spring Valley W. W. v. Schottler (110 U. S. 347; 4 Sup. Ct. Rep. 48), 440, 443
- St. Anthony Falls Water Power Co. v. Board (168 U. S. 349; 18 Sup. Ct. Rep. 157), 492
- St. Clair Coal Co. v. Martz (75 Pa. St. 384), 359
- St. Helen's Smelting Co. v. Tipping (11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N. S.) 785; 12 L. T. (N. S.) 775; 13 W. R. 1083), 663
- St. John v. American, etc., Ins. Co. (11 N. Y. 516; 1 Duer 371; 3 Benn. Fire Ins. Cas. 760), 804
- St. John Gas Co. v. Clarke (17 N. B. 307), 622
- St. Joseph Hydraulic Co. v. Wilson (133 Ind. 465; 33 N. E. Rep. 113), 608, 610
- St. Louis v. Arnot (94 Mo. 275; 7 S. W. Rep. 15), 430
- St. Louis v. Gaslight Co. (5 Mo. App. 484), 480
- St. Louis v. Jackson (25 Mo. 37), 488
- St. Louis v. St. Louis Gaslight Co. (70 Mo. 69, reversing 5 Mo. App. 484), 484, 536, 568, 577
- St. Louis v. Weber (44 Mo. 547), 488
- St. Louis v. Western U. Tel. Co. (148 U. S. 92), 444
- St. Louis Brewing Assn. v. St. Louis (37 S. W. Rep. (Mo.) 525), 580, 604
- St. Louis Gaslight Co. v. St. Louis, etc., Co. (16 Mo. App. 52), 494
- St. Louis Gaslight Co. v. St. Louis (11 Mo. App. 55; 84 Mo. 202), 625
- St. Louis Gaslight Co. v. St. Louis (46 Mo. 121), 484, 463
- St. Louis Gaslight Co. v. St. Louis (86 Mo. 495, affirming 11 Mo. App. 55), 472, 473
- St. Marys Gas Co. v. Elk Co. (191 Pa. St. 458; 43 Atl. Rep. 321), 838
- St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co. (14 Ohio Cir. C. Rep. 522), 685
- St. Paul Trust Co. v. Mintzer (65 Minn. 124; 67 N. W. Rep. 657; 32 L. R. A. 756), 291
- St. Tammany W. W. Co. v. New Orleans W. W. Co. (120 U. S. 64; 7 Sup. Ct. Rep. 405; 14 Fed. Rep. 194), 493, 494, 497
- Stage v. Boyer (183 Pa. St. 560; 38 Atl. Rep. 1035), 68, 83, 165, 213
- Stahl v. Van Vleck (53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335), 86, 95, 96, 126, 129, 142, 167, 168, 215
- Standard Oil Co. v. Danville (199 Ill. 50; 64 N. E. Rep. 1110, affirming 101 Ill. App. 65), 419
- Standard Oil Co. v. Lane (75 Wis. 636; 44 N. W. Rep. 644; 7 L. R. A. 191), 353
- Standard Oil Co. v. Sowden (55 Ohio St. 332; 45 N. E. Rep. 320; 36 Wkly. L. Bull. 306; 37 Wkly. L. Bull. 3), 356, 361

TABLE OF CASES.

xcix

(References are to pages.)

- Standard Oil Co. v. Swan** (89 Tenn. 434; 14 S. W. Rep. 928; 15 S. W. Rep. 1068; 10 L. R. A. 366), 779
Standard Oil Co. v. Tierney (92 Ky. 367; 17 S. W. Rep. 1025; 14 L. R. A. 677; 13 Ky. L. Rep. 626), 405
Standard Oil Co. v. Tierney (95 Ky. 633; 96 Ky. 89; 27 S. W. Rep. 983), 405
Stanley v. Western, etc., Co. (L. R. 3 Exch. 71; 37 L. J. Exch. 73; 17 L. T. (N. S.) 513; 16 W. R. 369), 806
Staples v. Dickson (88 Me. 362; 34 Atl. Rep. 168), 547
State v. Berdetta (73 Ind. 185; 20 Am. Law Reg. 342; 38 Am. Rep. 117), 334, 512, 513, 514
State v. Berry (52 N. J. L. 308; 19 Atl. Rep. 665), 649
State v. Boyce (43 Ohio St. 46; 1 N. E. Rep. 17), 524
State v. Butte City Water Co. (18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238), 577, 579, 593, 594
State v. Burt (64 N. C. 619), 42
State v. Cincinnati Gaslight & Coke Co. (18 Ohio St. 262), 428, 431, 434, 483, 499, 505, 540
State v. Cleveland, etc., Co. (3 Ohio Cir. Ct. 251), 440
State v. Columbus Gaslight, etc., Co. (34 Ohio St. 572; 32 Am. Rep. 390), 426, 440, 540, 618, 625
State v. Consolidated Gas Co. (85 Md. 637; 37 Atl. Rep. 263), 690, 697, 704, 707, 710, 758
State v. Consumers' Gas Trust Co. (157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245), 577, 581, 585, 586, 596
State v. Coosaw Mining Co. (47 Fed. Rep. 225), 83
State v. Fangbomer (14 Ohio Cir. Ct. Rep. 104; 7 Ohio Dec. 334), 836
State v. Frazier (28 Ind. 196), 512
State v. Goswell (93 N. W. Rep. (Wis.) 542), 604, 626
State v. Great Falls (19 Mont. 518; 49 Pac. Rep. 15), 476, 502, 568
State v. Hamilton (47 Ohio St. 52; 23 N. E. Rep. 935; 29 Am. and Eng. Corp. Cas. 208), 496, 558
State v. Harrison (46 N. J. L. 79), 453
State v. Hayes (78 Mo. 307), 53
State v. Indiana, etc., Co. (120 Ind. 575; 22 N. E. Rep. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579), 53, 383, 384, 385, 389, 415
State v. Ironton Gas Co. (37 Ohio St. 45), 425, 431, 452
State v. Janesville, etc., Co. (92 Wis. 496; 66 N. W. Rep. 512), 540, 541
State v. Jersey City (45 N. J. L. 246; 2 Am. and Eng. Corp. Cas. 233), 618
State v. Joplin W. W. (52 Mo. App. 312), 626
State v. Kearney (49 Neb. 337; 70 N. W. Rep. 255; 49 Neb. 325; 68 N. W. Rep. 533), 470
State v. Laclede Gaslight Co. (102 Mo. 472; 22 Am. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; 14 S. W. Rep. 974; 15 S. W. Rep. 383), 459, 508, 527, 535, 538, 420, 422, 427
State v. Levy (36 La. Ann. 491), 612
State v. Low (46 W. Va. 451; 33 S. E. Rep. 271), 840
State v. Mathis (21 Ind. 277), 512
State v. McCauley (15 Cal. 429), 450
State v. McGough (118 Ala. 159; 24 So. Rep. 395), 419
State v. Milwaukee Gaslight Co. (29 Wis. 454; 9 Am. Rep. 598), 446, 479, 541
State v. Moore (12 Cal. 56), 839

TABLE OF CASES.

(References are to pages.)

- State v. Moore (27 Ind. App. 83; 60 N. E. Rep. 955), 417
- State v. Murphy (170 U. S. 78; 18 Súp. Ct. Rep. 505), 528, 531, 533
- State v. New Orleans, etc., Co. (2 Rob. (La.) 529), 540
- State v. New Orleans, etc., Co. (32 So. Rep. (La.) 179), 583, 584, 585, 592, 595, 615
- State v. Oak Harbor Gas Co. (18 Ohio Cir. Ct. Rep. 751; 4 Ohio Cir. Ct. Dec. 158, affirmed 53 Ohio St. 347; 41 N. E. Rep. 584), 417
- State v. Oak Harbor Gas Co. (53 Ohio St. 347; 41 N. E. Rep. 584, reversing 34 Wkly. L. Bull. 221; 18 Ohio C. Ct. Rep. 751; 1 Toledo Leg. News 158), 55
- State v. Ohio Oil Co. (150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627), 33, 34, 39, 55, 417, 418
- State v. Parker (61 Tex. 265), 331
- State v. Payne (129 Mo. 468; 31 S. W. Rep. 797; 33 L. R. A. 576), 528, 535
- State v. Portland Natural Gas & Oil Co. (153 Ind. 483; 53 N. E. Rep. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314), 503
- State v. Quayle (71 Pac. Rep. (Utah) 1060), 450
- State v. Rodman (58 Minn. 393; 59 N. W. Rep. 1098), 38
- State v. Sedalia Gaslight Co. (34 Mo. App. 501; 84 Mo. 202), 596, 618, 625
- State v. St. Louis (145 Mo. 551; 46 S. W. Rep. 981), 488, 513, 533
- State v. State Board (57 N. J. L. 516; 31 Atl. Rep. 220; 27 L. R. A. 684), 337
- State v. Toledo (48 Ohio St. 112; 26 N. E. Rep. 1061; 11 L. R. A. 729), 559
- State v. Weatherby (45 Mo. 17), 519
- State v. Wellman (34 Minn. 221), 843
- State v. Wilkinson (2 Vt. 480), 512
- State v. Wilson (42 Me. 9), 329
- State National Bank v. Butler (149 Ill. 575; 36 N. E. Rep. 1000, reversing 48 Ill. App. 648), 338, 339
- Stearns v. Harris (8 Allen 597), 199
- Steelsmith v. Fisher Oil Co. (47 W. Va. 391; 35 S. E. Rep. 15), 126
- Steelsmith v. Gartlan (45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107), 68, 90, 93, 98, 99, 107, 115, 124, 129, 145, 163, 166, 167, 168, 250
- Steger v. Arctic Refrigerator Co. (89 Tenn. 453; 14 So. Rep. 1087; 11 L. R. A. 580), 363
- Stein v. Bienville Water Supply Co. (34 Fed. Rep. 145, affirmed 141 U. S. 67; 11 Sup. Ct. Rep. 892), 460, 490
- Steinau v. Cincinnati Gaslight & Coke Co. (48 Ohio St. 324; 27 N. E. Rep. 545, reversing 2 Ohio Cir. Ct. Rep. 236), 615
- Steinbach v. Lafayette Ins. Co. (54 N. Y. 90), 810
- Steinbach v. Relief Ins. Co. (77 N. Y. 498, affirmed 13 Wall. 183), 810
- Steiner v. Marks (172 Pa. St. 400; 33 Atl. Rep. 695), 193, 214
- Sterling's Appeal (111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49), 391, 491, 501, 529, 552
- Stetson v. Kempton (13 Mass. 272), 563
- Stevens v. Guffey (3 Russ. 171; 6 L. J. (O. S.) 164), 317
- Stewart v. Long Island Ry. Co. (102 N. Y. 601), 231
- Steward v. Wolveridge (9 Bing. 60), 244
- Stimmel v. Water (2 Bush. 282), 246, 247

TABLE OF CASES.

ci

(References are to pages.)

- Stinson v. Hardy (27 Ore. 584; 41 Pac. Rep. 116), 359
- Stock v. Boston (149 Mass. 410; 21 N. E. Rep. 871), 591
- Stockbridge Iron Co. v. Hudson Iron Co. (107 Mass. 290), 105
- Stockport W. W. Co. v. Potter (7 H. & N. 160; 7 Jur. (N. S.) 880; 31 L. J. Exch. 9), 653
- Stockton v. Stockton (40 Ind. 225), 172
- Stoddard v. Emery (128 Pa. St. 436; 24 W. N. C. 566; 18 Atl. Rep. 339), 107, 115, 128, 230
- Stone v. Boston, etc., Ry. (171 Mass. 536; 51 N. E. Rep. 1; 41 L. R. A. 794), 409
- Stoughton's Appeal (88 Pa. St. 198), 32, 33, 42, 51, 72, 279, 280
- Stoughton v. Leigh (1 Taunt. 402, 410), 288, 290, 294, 295
- Stout v. Commercial, etc., Ins. Co. (12 Fed. Rep. 554; 11 Biss. 309; 11 Ins. L. J. 688), 810
- Strawbridge v. City of Philadelphia (2 Penn. 419), 690
- Strawbridge v. Philadelphia (13 Phila. 173; 36 Leg. Int. 276; 13 Rep. 216; 2 Penny. 419), 515, 685, 690, 697, 722
- Stryker v. Cassidy (76 N. Y. 50), 358
- Stuart v. Adams (89 Cal. 367; 26 Pac. Rep. 970), 338, 344, 349, 351
- Stull v. Harris (51 Ark. 294; 11 S. W. Rep. 104), 281
- Sturges v. Bidgman (11 Ch. Div. 852; 48 L. J. Ch. 785; 41 L. T. 219; 28 W. R. 200), 663
- Sturtevant's Appeal (34 Pa. St. 149), 369
- Suburban Electric, etc., Co. v. East Orange (41 Atl. Rep. (N. J.) 865), 481, 535
- Suburban, etc., Co. v. East Orange (44 Atl. Rep. (N. J.) 628), 518
- Suffern v. Butler (21 N. J. Eq. 410, affirming 4 C. E. Green Ch. (N. J.) 202), 62, 73
- Sufferin v. Butler (4 C. E. Gr. Ch. (N. J.) 202, affirmed 21 N. J. Eq. 410), 77
- Summer v. Bromilow (34 L. J. Q. B. 130), 647
- Sunday Lake Mining Co. v. Wakefield (72 Wis. 264; 39 N. W. Rep. 136), 218, 219
- Sunnyside Coal Co. v. Reitz (14 Ind. App. 478; 43 N. E. Rep. 46), 49
- Superior v. Norton (63 Fed. Rep. 357), 469
- Surcombe v. Pinniger (3 DeG. M. & G. 571; 22 L. J. Ch. 419), 315
- Susquehanna Fertilizer Co. v. Spangler (86 Md. 562; 39 Atl. Rep. 270), 664
- Svea, etc., Co. v. Packham (92 Md. 464; 48 Atl. Rep. 359; 52 L. R. A. 95), 827
- Swearinger v. Steers (49 W. Va. 312; 38 S. E. Rep. 510), 277
- Swint v. McCalmont Oil Co. (184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021), 103, 142, 229, 231, 260, 309
- Sydney (27 Fed. Rep. 119, 123), 702
- Sylvester v. McCuaig (28 Up. Can. C. P. 443), 345
- Syracuse City Bank v. Tallman (31 Barb. 201), 367
- Syracuse Water Co. v. Syracuse (116 N. Y. 167; 22 N. E. Rep. 381; 5 L. R. A. 546), 492, 496

T

- Tabbart, *Ex parte* (6 Ves. 428), 279
- Tacoma Gas, etc., Co. v. Tacoma (14 Wash. 288; 44 Pac. Rep. 655), 434, 439
- Tacoma Hotel Co. v. Tacoma, etc., Co. (3 Wash. St. 316; 28 Pac. Rep. 516), 600, 607, 610

TABLE OF CASES.

(References are to pages.)

- Taliaferro v. Gay (78 Ky. 496), 367
- Tampa v. Tampa W. W. Co. (34 So. Rep. (Fla.) 631), 434, 438, 440, 524, 528
- Tannert v. ——— Ins. Co. (34 La. Ann. 249), 805
- Tarrytown, etc., Gaslight Co. v. Bird (65 Hun 621; 19 N. Y. Supp. 988), 622, 623
- Tarrytown v. Pocontico W. W. Co. (1 N. Y. Supp. 394), 518
- Taylor v. Baldwin (78 Cal. 517; 21 Pac. Rep. 124), 733
- Taylor v. Castle (42 Cal. 367), 342, 347
- Taylor v. Evans (1 H. & N. 101; 25 L. J. Exch. 269), 272
- Taylor v. Fried (161 Pa. St. 53; 28 Atl. Rep. 993), 307, 342
- Taylor v. Lambertville (10 Atl. Rep. (N. J.) 809), 447, 453, 455, 456, 469
- Taylor v. Mostyn (23 Ch. Div. 583; 53 L. J. Ch. 89; 49 L. T. 483; 32 W. R. 256), 373, 378, 380
- Taylor v. Mostyn (33 Ch. Div. 226), 372, 373
- Taylor v. Peerless Refining Co. (7 Ohio Dec. 368; 14 Ohio C. C. 315), 52, 156
- Taylor v. Watkins (62 Ind. 511), 630
- Teaff v. Hewitt (1 Ohio St. 511, 530), 629
- Tenant v. Goldwin (1 Salk. 21, 360; 2 Ld. Raym. 1089), 674
- Tennessee, etc., Co. v. Hamilton (100 Ala. 252; 14 So. Rep. 167), 654
- Terre Haute Gas Co. v. Teel (20 Ind. 131), 672
- Terstegge v. First German, etc., Co. (92 Ind. 82), 172
- Thackarah v. Haas (119 U. S. 499; 7 Sup. Ct. Rep. 311), 174
- Theriot v. Michel (28 La. Ann. 107), 346
- Thistlewaite v. State (149 Ind. 319; 39 N. E. Rep. 156), 599
- Thomas v. Brackney (17 Barb. 654), 664
- Thomas, etc., Co. v. Herter (60 Ill. App. 58), 49
- Thomas v. Hukill (34 W. Va. 385; 12 S. E. Rep. 522), 154, 183, 201
- Thomas v. Hurst (73 Fed. Rep. 372), 327
- Thomas v. Kirkbride (15 Ohio Cir. Ct. Rep. 294; 8 Ohio Dec. 181), 199, 202, 209
- Thomas v. Marble, etc., Co. (58 Fed. Rep. 485), 121
- Thomas v. Railroad Co. 101 U. S. 71), 527
- Thomas v. Smith (42 Pa. St. 68), 359
- Thompson's Appeal (101 Pa. St. 225), 81
- Thompson v. Bowman (6 Wall. 316), 346
- Thompson v. Christie (138 Pa. St. 230; 27 W. N. C. 87; 20 Atl. Rep. 934; 11 L. R. A. 236), 103, 104, 193, 197, 200, 202, 218, 224
- Thompson v. Mattern (115 Pa. St. 501; 9 Atl. Rep. 70), 334
- Thompson v. Nemeyer (59 Ohio St. 486; 52 N. E. Rep. 1024), 571
- Thompson v. Newton (7 Atl. Rep. (Pa.) 64), 304, 307
- Thompson v. Noble (3 Pittsb. 201; 17 Pittsb. L. Jr. 45), 32
- Thompson v. People (23 Wend. 537, 579), 519
- Thompson Glass Co. v. Fayette Fuel Co. (137 Pa. St. 317; 21 Atl. Rep. 93), 610
- Thomson-Houston Electric Co. v. Newton (42 Fed. Rep. 723), 561
- Thorn v. East London W. W. Co. (66 Gas J. 189), 588, 600
- Thorn v. Sutherland (123 N. Y. 236; 25 N. E. Rep. 362, reversing 4 N. Y. 694), 639

TABLE OF CASES.

ciii

(References are to pages.)

- Thorncroft v. Crockett** (16 Sims. 445; 2 H. L. Cas. 239; 12 Jur. 1081), 371, 372, 374, 376
Thunder v. Belcher (3 East. 449), 367
Tidewater Pipe Line Co. v. Berry (53 N. J. L. 212; 21 Atl. Rep. 490), 833
Tiehr v. Consolidated Gas Co. (51 N. Y. App. Div. 446; 65 N. Y. Supp. 10), 699, 702, 706, 767
Tift v. Horton (53 N. Y. 377), 631
Tiley v. Moyers (43 Pa. St. 404), 268
Tilly v. Slough Gas & Coke Co. (17 Gas J. 231), 667
Timlin v. Brown (158 Pa. St. 606; 28 Atl. Rep. 236), 162
Tipping v. Robbins (64 Wis. 546; 25 N. W. Rep. 713), 80, 297
Tipping v. Robbins (71 Wis. 507; 37 N. W. Rep. 427), 63, 80, 297
Tipton-Green Colliery Co. v. Tipton Moat Co. (7 Ch. Div. 192; 47 L. J. Ch. 152; 26 W. R. 348), 372
Tipton Light, etc., Co. v. Newcomer (67 N. E. Rep. (Ind. App.) 548), 735, 743
Titusville Novelty Iron Works' Appeal (77 Pa. St. 103), 642
Titusville Iron Works v. Keystone Oil Co. (130 Pa. St. 211; 13 Atl. Rep. 739), 364
Toledo v. Hosler (54 Ohio St. 418; 43 N. E. Rep. 583; 35 Ohio L. J. 215), 835, 838
Toledo v. N. W. Ohio Natural Gas Co. (5 Ohio C. C. 557; 3 Ohio Cir. D. 273), 424, 426, 431, 440, 586, 621
Toledo v. N. W. Ohio, etc., Co. (3 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531; 5 Ohio Cir. Ct. Rep. 557), 424, 428, 434, 597, 598
Tousley v. Galena, etc., Co. (24 Kan. 328), 333, 334
Towne v. Fiske (127 Mass. 125; 34 Am. Rep. 353), 633
Townsend v. Brown (24 N. J. L. 80), 528
Townsend v. State (147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; 62 Am. St. Rep. 477), 33, 34, 35, 45, 418
Townsend Gas, etc., Co. v. Port Townsend (19 Wash. 407; 53 Pac. Rep. 551), 559
Traders' Ins. Co. v. Catlin (163 Ill. 256; 45 N. E. Rep. 255, reversing 59 Ill. App. 162), 801, 809
Traders' Ins. Co. v. Race (142 Ill. 338; 31 N. E. Rep. 392), 801, 827
Trans-Atlantic Fire Ins. Co. v. Dorsey (56 Md. 70), 805
Traverse City Gas Co. v. Traverse City (89 N. W. Rep. (Mich.) 574), 420, 531, 533
Travellers' Ins. Co. v. Dunlap (160 Ill. 642; 43 N. E. Rep. 765, affirming 59 Ill. App. 515), 829
Tredinnick v. Red Cloud, etc., Co. (72 Cal. 78; 13 Pac. Rep. 152), 362
Tredwen v. Bourne (6 M. & W. 461; 9 L. J. (N. S.) Exch. 290; 4 Jur. 747), 348
Trees v. Eclipse Oil Co. (47 W. Va. 107; 34 S. E. Rep. 933), 84, 90, 120, 303, 308, 366
Trent v. Hunt (9 Exch. 14, 22), 366
Triple, etc., Co. v. Wellman (70 S. W. Rep. (Ky.) 40; 24 Ky. Law Rep. 851), 682, 685, 691, 738
Truby v. Palmer (4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74; 136 Pa. St. 556; 20 Atl. Rep. 516), 136, 198
Truman v. Truman (79 Ia. 506; 44 N. W. Rep. 721), 315
Trust v. Miami Oil Co. (10 Ohio D. 372; 19 Ohio C. C. Rep. 727), 361

TABLE OF CASES.

(References are to pages.)

- Trustees of School v. Schroll (120 Ill. 509; 12 N. E. Rep. 243), 93
- Trustees, etc., v. Williamson (26 Pa. St. 196), 801
- Tubb v. Liverpool, etc., Ins. Co. (106 Ala. 651; 17 So. Rep. 615), 809, 815
- Tugman v. Chicago (78 Ill. 405), 488
- Tullit v. Tullit (Amb. 370), 279
- Tunbridge Wells Corporation v. Baird ([1896] App. Cas. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788), 517
- Turnbull v. Home Fire Ins. Co. (83 Md. 312; 34 Atl. Rep. 875), 825
- Turner v. Revere Water Co. (171 Mass. 329; 50 N. E. Rep. 634), 607, 608
- Twin Lick Oil Co. v. Marbury (91 U. S. 593), 69, 92, 145, 146, 147
- Tyner v. People's Gas Co. (131 Ind. 408; 31 N. E. Rep. 61), 136
- Tyrone Gas & Water Co. v. Tyrone (195 Pa. St. 566; 46 Atl. Rep. 134), 481, 497
- U
- Uhl v. Ohio River Ry. Co. (47 W. Va. 59; 34 S. E. Rep. 934), 395
- Union Coal Co. v. City of La Salle (136 Ill. 119; 26 N. E. Rep. 506; 12 L. R. A. 326), 333
- Union Ferry Co., *In re* (98 N. Y. 139), 509
- Union Oil Co., *In re* (25 Land Dec. 351; 23 L. D. 222), 55
- Union Oil Co. (25 Land Dec. 351), 330
- Union Oil Co.'s Appeal (3 Penny. (Pa.) 504), 261
- Union Petroleum Co. v. Bliven Petroleum Co. (72 Pa. St. 173), 72, 106
- United Electric Light, etc., Co. v. Beneman (46 N. Y. Supp. 916; 21 N. Y. Misc. 41), 614
- United Life Ins. Co. v. Foote (22 Ohio St. 340; 2 Ins. L. Jr. 190), 805
- United Merthyr Coal Co., *In re* (L. R. 15 Eq. 46; 21 W. R. 117), 49
- United Mines Co. v. Hatcher (79 Fed. Rep. 517; 25 C. C. A. 46), 359, 361
- United Oil Co. v. Roseberry (69 Pac. Rep. (Cal.) 588), 707, 709, 713, 728
- United Pipe Line Co. v. Delaware, etc., Ry. Co. (62 N. J. L. 254; 41 Atl. Rep. 759; 42 L. R. A. 572), 394
- United States v. Buffalo, etc., Co. (172 U. S. 339; 19 Sup. Ct. Rep. 200, affirming 78 Fed. Rep. 110; 45 U. S. App. 345; 24 C. C. A. 4), 55
- United States v. Dermitt (8 Wall. 41), 419
- United States v. New Orleans R. R. (12 Wall. 362), 631
- United States Canal, etc., Co. v. Randolph County Board (38 W. Va. 201; 18 S. E. Rep. 566), 841
- United States, etc., Co. v. Metropolitan Club (6 App. D. C. 536), 612
- United States, etc., Co. v. Newman (84 Va. 52; 3 S. E. Rep. 805), 830
- United Water Works Co. v. Omaha Water Co. (21 N. Y. Misc. 594; 48 N. Y. Supp. 817), 390
- United States W. W. Co. v. Du Bois (176 Pa. St. 439; 38 W. N. C. 419; 35 Atl. Rep. 251), 460
- University of Vermont v. Joslyn (21 Vt. 52), 238
- Upington v. Corringan (151 N. Y. 143; 45 N. E. Rep. 369), 186
- V
- Vail v. Weaver (132 Pa. St. 363; 19 Atl. Rep. 138), 636

TABLE OF CASES.

CV

(References are to pages.)

- Vallee es Qualite v. New City Gas Co. (7 Am. Law. Rev. 767), 708, 749, 750
- Valparaiso v. Gardner (97 Ind. 1; 49 Am. Rep. 416), 450, 468, 509
- Vandergriff's Appeal (83 Pa. St. 126), 360
- Vanderlin v. Hovis (152 Pa. St. 11; 25 Atl. Rep. 232), 101
- Vandevoort v. Dewey (42 Hun 68), 189
- Van Meter v. Chicago, etc., Co. (88 Ia. 92; 55 N. W. Rep. 106), 163
- Van Rensselaer v. Hayes (19 N. Y. 68; 75 Am. Dec. 278), 229
- Van Voorhis v. Oliver (22 Pittsb. L. J. (N. S.) 114), 87, 187
- Van Wickley v. Paulson (14 Barb. 654), 251
- Vaughen v. Haldeman (33 Pa. St. 522; 75 Am. Dec. 622), 632
- Venture Oil Co. v. Fretts (152 Pa. St. 451; 25 Atl. Rep. 732), 68, 115, 129, 148, 164, 283
- Verdolite Co. v. Richards (7 North Co. Rep. (Pa.) 113), 194
- Vervalen v. Older (4 Halst. (N. J.) Ch. 98), 370, 371
- Vestry of St. Mary v. County, etc., Co. ([1899] 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 31; 15 T. L. Rep. 175), 517
- Vickerman v. Leeds, etc., Co. (15 Gas J. 654), 718, 723
- Victoria Docks Gas Co. v. Burton (16 Gas J. 103), 620, 623
- Viele v. Germania Ins. Co. (26 Ia. 9; 96 Am. Dec. 83), 817
- Vietti v. Nesbitt (22 Nev. 390; 41 Pac. Rep. 151), 340
- Vincennes v. Citizens' Gaslight Co. (132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485), 456, 490, 509
- Viner v. Vaughan (2 Beav. 466), 238
- Virginia City Gas Co. v. Virginia City (3 Nev. 320), 468
- Virginia Coal Co. v. Kelley (93 Va. 332; 24 S. E. Rep. 1820), 306
- Visalia Gas, etc., Co. v. Sims (104 Cal. 326; 37 Pac. Rep. 1042), 527
- Voorhis v. Freeman (2 Watts. & S. 116; 37 Am. Dec. 490), 632
- Vosbeck v. Kellog (80 N. W. Rep. (Minn.) 957), 754

W

- Waddington v. Allegheny Heating Co. (6 Pa. Co. Ct. Rep. 96), 428, 434
- Wagner v. H. W. Jayne Chemical Co. (147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 772), 721, 736, 759
- Wagner v. Mallory (41 N. Y. App. Div. 126; 58 N. Y. Supp. 526), 165
- Wagner v. Mallory (169 N. Y. 501; 62 N. E. Rep. 584, affirming 58 N. Y. Supp. 526), 42, 49, 75, 78, 79, 230
- Wagner v. Rock Island (146 Ill. 139; 34 N. E. Rep. 545; 21 L. R. A. 519), 835
- Wagstaff v. Lowerre (23 Barb. 209), 252
- Wake v. Hall (7 Q. B. Div. 295; 8 App. Cas. 195), 640
- Wakefield v. Sunday Lake, etc., Co. (85 Mich. 605; 49 N. W. Rep. 135), 195, 200, 210
- Waldeck v. Springfield, etc., Ins. Co. (56 Wis. 96; 14 N. W. Rep. 1; 12 Ins. L. Jr. 177), 804
- Walker v. Chicago, etc., R. R. Co. (71 Ia. 658; 33 N. W. Rep. 224), 701
- Walker v. Jeffreys (1 Ha. 341; 11 L. J. Ch. 209; 6 Jur. 336), 314
- Walker v. Moore (10 B. & C. 416; 8 L. J. (O. S.) K. B. 159), 320
- Walker v. Tupper (152 Pa. St. 1; 25 Atl. Rep. 172), 342

(References are to pages.)

- Wall v. Hinds (4 Gray 256; 64 Am. Dec. 64), 233, 635, 637, 638, 639
- Walla Walla v. Walla Walla Water Co. (172 U. S. 1; 19 S. Ct. Rep. 77), 420, 421, 444, 488, 489, 492, 495, 499, 531, 538, 541, 675
- Wallace v. Jefferson Gas Co. (147 Pa. St. 205; 23 Atl. Rep. 416), 397
- Wallace v. Standard Oil Co. (66 Fed. Rep. 260), 781
- Wallace v. Travelers' Ins. Co. (54 Kan. 442; 38 Pac. Rep. 489), 284
- Wallas v. San Jose (29 Cal. 180), 469
- Waller v. Davis (59 Ia. 103; 12 N. W. Rep. 798), 351
- Walter v. Hartwig (106 Ind. 123; 6 N. E. Rep. 5), 104
- Walters v. Morgan (3 DeG. F. & J. 718; 4 L. T. 758), 319
- Walters v. Northern Coal Mining Co. (25 L. J. Ch. (N. S.) 633; 5 DeG. M. & G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1), 228, 232, 235, 238, 242
- Walton v. Cronly (14 Wend. 63), 238, 365
- Wandsworth, etc., Co. v. Wright (19 Gas J. 407; 18 W. R. 728), 540
- Ward v. Carp River Iron Co. (47 Mich. 65; 10 N. W. Rep. 109), 370, 371
- Ward v. Folkstone W. W. Co. (24 Q. B. Div. 234; 59 L. J. M. C. 65; 62 L. T. 321; 38 W. R. 426; 54 J. P. 628), 547
- Ward v. Gaslight & Coke Co. (14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10, 38, 74, 108), 728, 764
- Ward v. Walton (4 Ind. 75), 172
- Ward v. Ward (40 W. Va. 611; 21 S. E. Rep. 746; 29 L. R. A. 449), 292
- Wardell v. Watson (93 Mo. 107; 5 S. W. Rep. 605), 77, 97, 329
- Ware v. Langmade (9 Ohio C. Ct. Rep. 85; 6 Ohio C. Dec. 43; 2 Ohio Dec. 116), 94, 119, 125
- Warn v. Davis Oil Co. (61 Fed. Rep. 631), 703, 779
- Warren v. Ferdinand (9 Allen 357), 277
- Warren v. Sohn (112 Ind. 213; 13 N. E. Rep. 863), 362
- Warren v. Wilder (20 Gas J. 892), 735
- Warren Gaslight Co. v. Pennsylvania Gas Co. (13 Pa. Ct. Rep. 310, affirmed 161 Pa. St. 510; 29 Atl. Rep. 101), 501, 529, 530
- Warsaw W. W. Co. v. Warsaw (16 N. Y. App. Div. 502; 44 N. Y. Supp. 876), 497
- Washburn v. Miami, etc., Ins. Co. (2 Fed. Rep. 633; 2 Flipp. 664; 9 Ins. L. Jr. 68), 805
- Washburn v. Artisans' Ins. Co. (Fed. Cas. No. 17212; 9 Ins. L. Jr. 68), 805
- Washburn v. Fletcher (42 Wis. 152), 95
- Washburn v. Western Ins. Co. (2 Fed. Rep. 633; Fed. Cas. No. 17216; 9 Ins. L. Jr. 424), 805
- Washington, etc., Gas Co. v. Johnson (123 Pa. St. 576; 16 Atl. Rep. 79; 16 Morr. Min. Rep. 165), 231, 233, 235, 239, 245
- Washington Gaslight Co. v. District of Columbia (161 U. S. 316; 16 Sup. Ct. Rep. 564; 24 Wash. L. Rep. 470, affirming 20 D. C. 39), 547, 787
- Washington Gaslight Co. v. Eckloff (22 Wash. L. Rep. 656; 4 App. D. C. 174), 697, 701
- Washington Gaslight Co. v. Eckloff (7 App. D. C. 372; 22 Wash. L. Rep. 656; 4 App. D. C. 174), 721, 736, 747, 750
- Washington Tp., etc., Co. v. McCormick (19 Ind. App. 663; 49 N. E. Rep. 1085), 726, 727

TABLE OF CASES.

cvii

(References are to pages.)

- Watauga Water Co. v. Wolfe** (99 Tenn. 429; 41 S. W. Rep. 1060), 596
Waterman v. Banks (144 U. S. 394; 12 Sup. Ct. Rep. 646), 167
Waters v. Merchants', etc., Ins. Co. (11 Pet. 213), 802
Waters-Pierce Oil Co. v. Davis (24 Tex. Civ. App. 508; 60 S. W. Rep. 453), 784
Waters-Pierce Oil Co. v. King (6 Tex. Civ. App. 93; 24 S. W. Rep. 700), 778
Waters-Pierce Oil Co. v. McElroy (Tex. Civ. App.) (47 S. W. Rep. 272), 419
Watson, etc., Co. v. Casteel (73 Ind. 296), 231, 233
Watson v. U. R. & G. Gravel Co. (50 Mo. App. 635), 296
Watson v. Gas Co. (5 U. P. Q. B. (Can.) 262), 672, 673
Watt v. Equitable Gas Co. (8 Super. Ct. (Pa.) 618; 29 Pittab. L. J. (N. S.) 221; 43 W. N. C. 215), 235
Watts v. Gantt (42 Neb. 869; 61 N. W. Rep. 104), 390
Watts v. Tibbals (6 Pa. St. 447), 42
Way v. Reed (6 Allen 364), 171, 242
Waymart Water Co. v. Waymart (4 Pa. Super. Ct. 211), 446
Weaver v. Burr (31 W. Va. 736; 8 S. E. Rep. 743), 92
Webb v. Ohio Gas Fuel Co. (16 Wkly. Law Bull. 121; 9 Ohio Dec. Rep. 662), 552
Webster v. Harwinton (32 Conn. 131), 563
Weld v. Gaslight Co. (1 Starkie 150), 789
Wellington v. Downer Kerosene Co. (104 Mass. 64), 785, 786
Wells v. Ellis (68 Cal. 243; 9 Pac. Rep. 80), 346
Wellston v. Morgan (59 Ohio St. 147; 52 N. E. Rep. 127), 453
Welsh v. Beaver Falls (40 Atl. Rep. (Pa.) 784), 496
Welty v. Wise (5 Ohio N. P. 50), 165
Wentz's Appeal (106 Pa. St. 301), 290, 291
Werner v. Ashland Lighting Co. (84 Wis. 652; 54 N. W. Rep. 996), 714
Wesling v. Kroll (78 Wis. 636; 47 N. W. Rep. 943), 193, 216
West v. Bancroft, etc., Co. (158 N. Y. 231; 52 N. E. Rep. 1092), 548
West Chester Gas Co. v. Chester Co. (30 Pa. St. 232), 832, 839
West Cumberland Iron Co. v. Kenyon (L. R. 11 Ch. Div. 782; 48 L. J. Ch. 793; 40 L. T. 703), 655
West Hartford v. Hartford Water Comrs. (68 Conn. 323; 36 Atl. Rep. 786), 582
West, etc., Co. v. Philadelphia (3 Pa. Dist. Rep. 52), 838
West Ridge Coal Co. v. Van Storch (5 Lack. Leg. N. 189; 7 Del. Co. Rep. 467), 191, 261
West Shore Mills Co. v. Edwards (24 Ore. 475; 33 Pac. Rep. 987), 229
West Virginia, etc., Co. v. Ohio River Pipe Line Co. (22 W. Va. 600), 389
West Virginia, etc., Co. v. Volcanic Oil & Coal Co. (5 W. Va. 382), 53, 383, 388
Westerly W. W. Co. v. Westerly (75 Fed. Rep. 181; 76 Fed. Rep. 467), 488, 491, 496, 499
Westerly W. W. Co. v. Westerly (80 Fed. Rep. 611), 488, 491, 492, 496, 499
Western Penn. Gas Co. v. George (161 Pa. St. 47; 34 W. N. C. 332; 28 Atl. Rep. 1004), 153, 173, 211

(References are to pages.)

- Western Saving Fund Society v. Philadelphia (31 Pa. St. 175; 72 Am. Dec. 730), 559, 569
- Western Paving, etc., Co. v. Citizens', etc., Co. (128 Ind. 525; 26 N. E. Rep. 188; 28 N. E. Rep. 88), 525, 544
- Western, etc., Co. v. Rector (85 Ky. 294; 3 S. W. Rep. 415; 9 Ky. L. Rep. 3), 822, 823
- Western Union Telegraph Co. v. Massachusetts (125 U. S. 530), 837
- Westfield Gas, etc., Co. v. Mendenhall (142 Ind. 538; 41 N. E. Rep. 1033), 423, 427, 488
- Westlake v. St. Louis (77 Mo. 47), 602
- Westmoreland Co.'s Appeal (85 Pa. St. 344), 287
- Westmoreland, etc., Co. v. DeWitt (130 Pa. St. 235; 18 Atl. Rep. 724; 29 Am. L. Reg. 93; 5 L. R. A. 731), 32, 33, 34, 97, 106, 117, 119, 176, 182, 212, 321, 323
- Weston v. Woodcock (7 M. & W. 14), 646
- Weston's Case (L. R. 4 Ch. App. 20; 38 L. J. Ch. 49; 19 L. T. 337; 17 W. R. 62), 352
- Wetmore v. Brooklyn Gaslight Co. (42 N. Y. 384), 549
- Wettengel v. Gormley (160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733), 54, 73, 75, 103, 230, 260
- Whallen v. Citizens' Gaslight Co. (63 N. Y. Rep. 317; 30 N. Y. Supp. 1077), 788
- Wheeler v. Earl (5 Cush. 31), 199
- Wheeler v. Philadelphia (77 Pa. St. 338), 558
- Wheeler v. Traders' Ins. Co. (1 Atl. Rep. (N. H.) 293), 807, 822
- Wheeler v. West (71 Cal. 126; 11 Pac. Rep. 871), 79, 82
- Wheeling Gas Co. v. Wheeling (8 W. Va. 320), 568
- Whitaker v. Brown (46 Pa. St. 197), 329
- Whitcomb v. Hoyt (30 Pa. St. 403), 160, 168
- White v. Meadville (177 Pa. St. 643; 27 Pittsb. L. J. (N. S.) 97; 39 W. N. C. 102; 35 Atl. Rep. 695; 34 L. R. A. 567), 482
- White v. Wager (25 N. Y. 328), 281
- White v. Western, etc., Co. (18 W. N. C. (Pa.) 279; 6 Atl. Rep. 113), 801, 807
- Whitehouse v. Liverpool, etc., Co. (5 C. B. 798; 5 M. Gr. & S. 798), 578, 590
- Whitfield v. Bewit (2 P. Wms. 240), 289
- Whitman v. Fayette Fuel Gas Co. (139 Pa. St. 492; 20 Atl. Rep. 1062), 255, 592, 612
- Whitmarch v. Charter Oak Fire Ins. Co. (2 Allen 581), 816
- Whitmore v. Empson (23 Beav. 313; 26 L. J. Ch. 364), 647
- Wichita Gas, etc., Co. v. Wright (9 Kan. App. 730; 59 Pac. Rep. 1085), 729
- Wild v. Holt (9 M. & W. 672; 1 D. N. S. 876; 11 L. J. Exch. 285), 49
- Wilde v. Waters (16 C. B. 637; 24 L. J. C. P. 193; 1 Jur. (N. S.) 1021), 638
- Wilgus v. Whitehead (89 Pa. St. 131), 101, 261
- Wilkes-Barre Gas Co. v. Turner (7 Kulp. (Pa.) 399), 583, 612, 621, 836
- Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co. (4 Kulp. 47), 491, 530, 501
- Wilkins v. Abell (26 Colo. 462; 58 Pac. Rep. 612), 105, 353, 359
- Wilkinsburg Gas Co. v. Wilkinsburg (25 L. J. (N. S.) 42), 533
- Wilkinson v. Wilkinson (59 Wis. 557; 18 N. W. Rep. 528), 291

TABLE OF CASES.

cix

(References are to pages.)

- Willard v. Killingworth (8 Conn. 247), 563
- Willcock v. Crescent Oil Co. (184 Pa. St. 245; 28 Pittsb. L. J. (N. S.) 351; 39 Atl. Rep. 77), 844
- Willets v. Brown (42 Hun 140), 64
- Willi v. Dryden (52 Mo. 319), 238
- Willis v. Perry (92 Ia. 297; 60 N. W. Rep. 727; 26 L. R. A. 124), 300
- Wills v. Manufacturers' Natural Gas Co. (130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 603), 181, 183, 224, 266, 277
- Williams' Appeal (1 Monaghan (Pa.) 274), 641
- Williams v. Augusta (4 Ga. 500 [gunpowder]), 418
- Williams v. Bolton (3 P. Wms. 268; 1 Cox Ch. Cas. 72), 292
- Williams v. Bosanquet (1 Brod. & Birg. 238), 238
- Williams v. Gibson (84 Ala. 228; 4 So. Rep. 350), 76, 329
- Williams v. Guffey (178 Pa. St. 342; 35 Atl. Rep. 875), 264, 275
- Williams v. Ins. Co. (31 Me. 219), 813
- Williams v. Insurance Co. (54 N. Y. 569; 13 Am. Rep. 620), 813, 814
- Williams v. Kenney (14 Barb. 629), 333
- Williams v. Ladew (171 Pa. St. 369; 33 Atl. Rep. 329), 153
- Williams v. Lake (2 El. & El. 349; 29 L. J. Q. B. 1; 6 Jur. (N. S.) 45; 1 L. T. 56; 8 W. R. 41), 314
- Williams v. Medlicott (8 Price 496), 373
- Williams v. Morrison (32 Fed. Rep. 177), 79
- Williams v. Mutual Gas Co. (52 Mich. 499; 50 Am. Rep. 266; 18 N. W. Rep. 236; 4 Am. and Eng. Corp. Cas. 66), 576, 579, 585, 586, 592, 594, 601
- Williams v. People's Fire Ins. Co. (57 N. Y. 274), 801, 808
- Williams v. Short (155 Pa. St. 480; 26 Atl. Rep. 662), 232, 327
- Williams v. South Penn Oil Co. (43 S. E. Rep. (W. Va.) 214), 97, 297
- Williams v. Toledo Coal Co. (25 Ore. 426; 36 Pac. Rep. 159), 356
- Williams v. Vanderbilt (145 Ill. 238; 34 N. E. Rep. 476), 309
- Williamson v. Jones (39 W. Va. 231; 19 S. E. Rep. 436; 38 L. R. A. 694; 43 W. Va. 562; 27 S. E. Rep. 411), 33, 43, 280, 296, 301, 303, 304, 305, 307, 308, 330
- Williamson v. Jones (43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891), 51, 280, 289, 292, 293
- Williamsport Gas Co., *In re* (17 Pa. Co. Ct. Rep. 456; 2 Lack. L. News 112; 5 Pa. Dist. Rep. 251), 481, 483
- Wilson, *Ex parte* (2 Mont. & Ayr. 61; 4 Dea. & Chit. 143; 4 L. J. (N. S.) Bank 24), 633, 636
- Wilson v. Bogle (95 Tenn. 290; 32 S. W. Rep. 386), 298
- Wilson v. Davis (1 Mont. 183), 346
- Wilson v. Freeman (7 Wkly. W. N. C. (Pa.) 33), 632
- Wilson v. Goldstein (152 Pa. St. 524; 25 Atl. Rep. 493), 169, 185, 186
- Wilson v. Holden (15 Q. B. 533; 19 L. J. Q. B. 73; 14 Jur. 835), 345
- Wilson v. Rochester (180 Pa. St. 509; 38 Atl. Rep. 136), 482
- Wilson v. Tennent (65 N. Y. Supp. 852, affirmed 61 App. Div. 100; 70 N. Y. St. Rep. 2), 842, 588
- Wilson v. Youst (43 W. Va. 826; 28 S. E. Rep. 781; 39 L. R. A. 292), 32, 76, 289
- Wigans v. Peebles (32 N. Y. 423), 281
- Winchester v. Capron (63 N. H. 605), 333

TABLE OF CASES.

(References are to pages.)

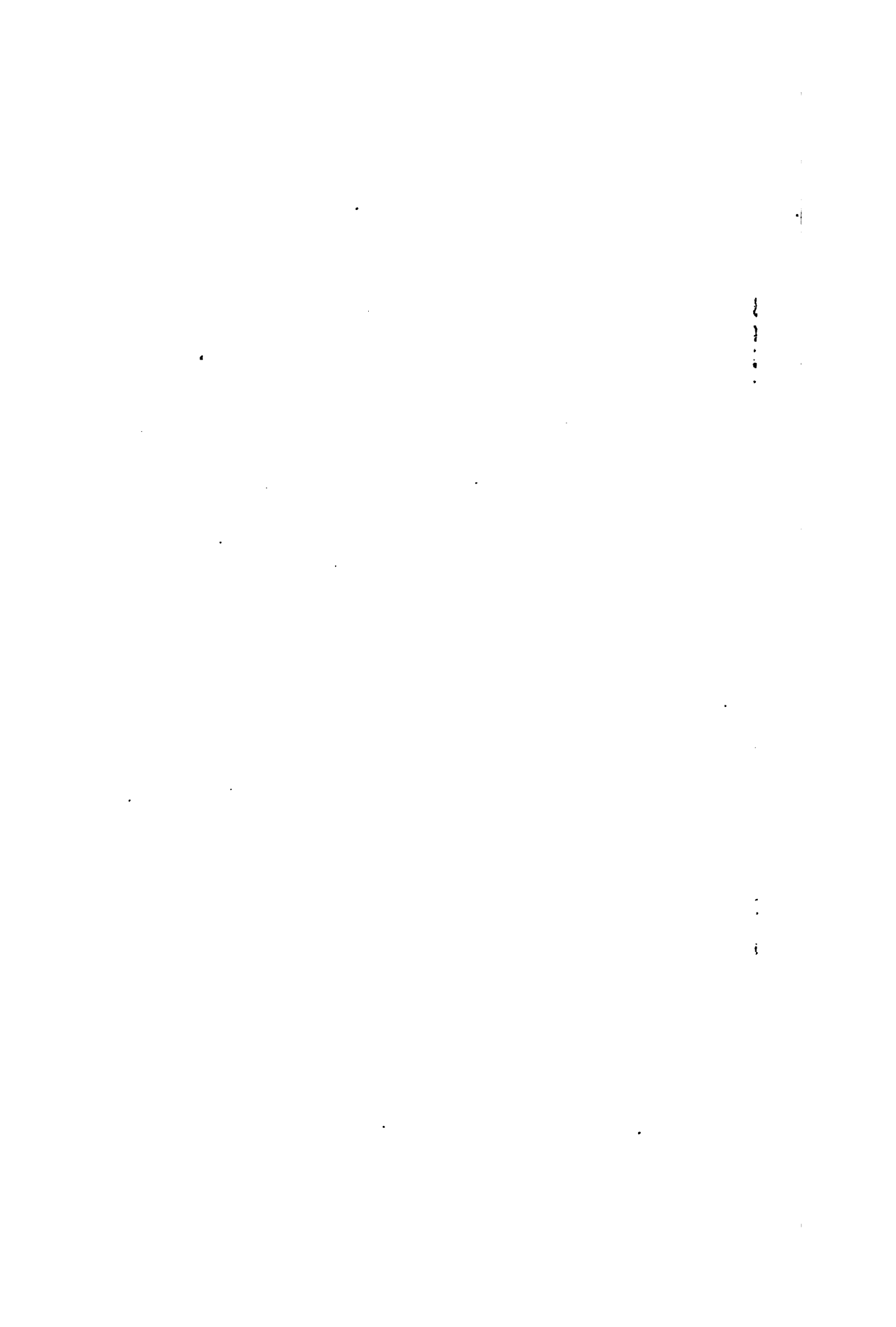
- Winchester v. Knight (1 P. Wms. 406), 277
 Windfall Mfg. Co. v. Patterson (148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532), 136, 389, 665, 671, 674, 675
 Windfall, etc., Co. v. Tutewiler (152 Ind. 364; 53 N. E. Rep. 284), 389, 394, 649
 Winfield v. Winfield Gas Co. (37 Kan. 24; 14 Pac. Rep. 499), 446, 466
 Winfield v. Winfield Water Co. (51 Kan. 70; 32 Pac. Rep. 663), 461
 Winfield Water Co. v. Winfield (51 Kan. 70; 32 Pac. Rep. 663), 474
 Winston v. Spokane (12 Wash. 524; 41 Pac. Rep. 888), 450
 Winton Coal Co. v. Pancoast Coal Co. (170 Pa. St. 437; 33 Atl. Rep. 110), 301
 Witcher v. Holland Water Works Co. (66 Hun 619; 20 N. Y. 560, affirmed 142 N. Y. 626; 37 N. Y. Rep. 565), 515, 548
 Witte v. Western, etc., Ins. Co. (1 Mo. App. 188), 825
 Wolf v. Cincinnati, etc., Co. (6 Ohio Dec. 159), 393
 Wolf v. Guffey (161 Pa. St. 276; 28 Atl. Rep. 1117), 200
 Wolverhampton R. R. Co. v. London, etc., R. R. Co. (L. R. 16 Eq. 433; 43 L. J. Ch. 131), 318
 Wolveridge v. Steward (1 C. & M. 644; 2 L. J. Exch. 303; 3 Tyr. 637), 235
 Womersley v. Church (17 L. T. (N. S.) 190), 661
 Wood v. Auburn (87 Me. 287; 32 Atl. Rep. 906), 609
 Wood v. Gaynon (1 Amb. 395), 646
 Wood v. Holly Mfg. Co. (100 Ala. 660; 13 So. Rep. 948), 363
 Wood v. Leadbitter (13 M. & W. 838), 82
 Wood v. Morewood (3 Q. B. 440, note), 49
 Wood v. N. W. Ins. Co. (46 N. Y. 421), 53
 Wood v. Wand (3 Exch. 748; 18 L. J. Exch. 305; 13 L. T. 212; 13 Jur. 742), 675
 Wood County, etc., Co. v. West Virginia, etc., Co. (28 W. Va. 210; 57 Am. Rep. 659), 33, 136, 137
 Woodard v. Mitchell (140 Ind. 406; 39 N. E. Rep. 437), 208
 Woodburn's Estate (138 Pa. St. 606; 21 Atl. Rep. 16), 229, 287, 288, 293
 Woodburn v. Auburn (87 Me. 287; 32 Atl. Rep. 906), 577
 Woodland Oil Co. v. Crawford (55 Ohio St. 161; 36 Ohio L. J. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62), 78, 92, 183, 187, 212, 235, 271
 Woodman v. Metropolitan, etc., Co. (149 Mass. 335; 21 N. E. Rep. 482; 4 L. R. A. 213), 754
 Woodruff v. Bowen (136 Ind. 431; 34 N. E. Rep. 113), 406
 Woods v. Greensboro, etc., Gas Co. (54 Atl. Rep. (Pa.) 476), 391
 Woodside v. Cicconi (93 Fed. Rep. 1; 35 C. C. A. 177), 76, 105, 166
 Woodward v. Delaware, etc., Co. (121 Pa. St. 344; 15 Atl. Rep. 622), 839
 Worcester Gaslight Co. v. Worcester (110 Mass. 353), 598
 Worksop v. Worksop Gas Co. (22 Gas J. 96), 473
 Worrall v. Wilson (101 Ia. 475; 70 N. W. Rep. 619), 169
 Wragg v. Commercial Gas Co. (33 Gas J. 119, 313), 665
 Wray v. Evans (80 Pa. St. 102), 788
 Wright v. Brosseau (73 Ill. 381), 351
 Wright v. Chicago, etc., Ry. Co. (27 Ill. App. 200), 410

TABLE OF CASES.

cxii

(References are to pages.)

- Wright v. Colchester Gas Co. (30 Gas J. 336), 584, 601
- Wright v. McDonnell (88 Tex. 140; 30 S. W. Rep. 907), 639, 644
- Wright v. Warrior Run Coal Co. (182 Pa. St. 514; 41 W. N. C. 179; 9 Kulp. 1; 28 Pittsb. L. J. (N. S.) 202; 38 Atl. Rep. 491), 258
- Wright v. Stears (48 Gas J. 1068), 543
- Wyandotte Electric Light Co. v. Wyandotte (124 Mich. 43; 82 N. W. Rep. 821), 499
- X
- Xenia Real Estate Co. v. Macy (147 Ind. 568; 47 N. E. Rep. 147), 255, 592, 612, 613
- Y
- Yater v. Mullen (24 Ind. 277), 630
- Yellow River, etc., Co. v. Wood County (81 Wis. 554; 51 N. W. Rep. 1004), 833
- Yentzer v. Farmers', etc., Ins. Co. (200 Pa. St. 325; 49 Atl. Rep. 767), 809
- York v. Jones (2 N. H. 454), 277
- York, etc., R. R. Co. v. Winans (17 How. 30), 527
- Youch v. Home, etc., Ins. Co. (111 Cal. 503; 44 Pac. Rep. 189; 34 L. R. A. 857), 795, 814
- Youghiogeny R. Coal Co. v. Pierce (153 Pa. St. 74; 25 Atl. Rep. 1026), 80
- Young v. Boston (104 Mass. 95), 618
- Young v. Bransford (12 Lea. 232), 701
- Young v. Ellis (91 Va. 297; 21 S. E. Rep. 480), 75, 79, 219
- Young v. Equitable Gas Co. (5 Pa. Super. Ct. Rep. 232; 28 Pittsb. L. J. (N. S.) 75; 41 W. N. C. 24), 127, 253
- Young v. Forest Oil Co. (194 Pa. St. 243; 45 Atl. Rep. 121; 30 Pittsb. L. J. (N. S.) 221), 107, 115, 151, 154, 182
- Young v. Southwark, etc., Co. (69 L. T. 144; 41 W. R. 622; 57 J. P. 806; 5 Rep. 432), 583
- Young v. Vandergrift (30 Pittsb. Leg. J. (N. S.) 39), 128, 154, 182
- Young v. Vandergrift (30 Pittsb. L. J. (N. S.) 39; 194 Pa. St. 234; 45 Atl. Rep. 119), 203
- Youngblood v. Sexton (32 Mich. 406; 20 Am. Rep. 654), 563
- Z
- Zanesville v. Zanesville Gaslight Co. (47 Ohio St. 1; 23 N. E. Rep. 555; 29 Am. and Eng. Corp. Cas. 190), 426, 427
- Zanesville Gaslight Co. v. Zanesville (47 Ohio St. 35; 23 N. E. Rep. 60; 23 Wkly. L. Bull. 70; 29 Am. and Eng. Corp. Cas. 190), 440
- Zouche v. Dalbaic (L. R. 10 Exch. 177), 251



CHAPTER I.

HISTORICAL SKETCH

- §1. Petroleum known to ancients.
- §2. Early discoveries of petroleum in United States.
- §3. Early account of a Western New York oil spring.
- §4. Washington county, Ohio, oil well.
- §5. The first oil well in United States.
- §6. Other first oil wells in United States.
- §7. In what countries petroleum found.
- §8. Natural gas known to ancients.
- §9. Early natural gas in America.
- §10. Sources and composition of petroleum and gas.
- §11. Composition of petroleum.
- §12. Composition of natural gas.
- §13. Early attempts at distilling or refining petroleum.
- §14. Early use of petroleum as a medicine.
- §15. Transportation.
- §16. The first oil lease.
- §17. Early use of artificial illuminating gas.

§1. Petroleum known to ancients.

Petroleum was not unknown to the ancients. It is related chemically closely to asphalt or asphaltum.¹ Asphalt was used in cementing the stone walls of Nineveh and Babylon, even in laying the famous Tower of Babel; and is called in the Old Testament "slime of mortar." Slime pits were near the city Is, the present Hit, on the river Is, a tributary of the Euphrates—

¹ "When the Jews were led into Persia they found pits in which the priests concealed the sacred fire they required for their sacrifices."—2 Maccabees. Chap. I. The contemporaries of Nehemiah, in after years, found an oil, which poured on the hot stone used in sacrifices, burst into high flames. These pits the Jews closed and applied to them the term *nephtar* or *nephtoj*—a place of expiation. Hence our word naphtha.

sometimes called the Spring of Is.² This spring attracted the attention of Alexander and Trajan. Mention is made in the Old Testament of fountains and springs of oil, which may be taken without doubt to relate to petroleum springs. Asphaltum is quite common in the Dead Sea regions, especially upon the shores of that mysterious body of water. The Egyptians knew the value and use of petroleum and asphalt; for they soaked the cerements of the dead in them, which has been one of the factors in the preservation of the mummies to the present day. A mummy will readily burn, because of the fact that it was wrapped in clothes soaked in petroleum or liquid asphaltum.³ Their term for it was "rock oil"; and it is supposed that they got it near a place on western mouth of the Gulf of Suez, called at the present day Djebel-ez-Zeit, which is the Arabic name for "Oil Mountain." Oil was discovered at that place in February, 1886. The oil fountains of Hit were celebrated among the Arabs and Persians. Herodotus, four hundred and fifty years before the Christian Era, makes mention of the then famous Spring of Zante, Zante being one of the Ionian Islands. Pliny and Dioscorides speak of the oil taken from the earth at Agrigentum, Sicily, and of its use in lamps as "Sicilian Oil." From time immemorial, near Rivanazzano, in Sardinia, small rills of oil have run from the earth. The famous Caspian region, or Baku district, was well known to the ancients, they making use of the oil and gas of that region.⁴ It is supposed that the famous Greek Fire was nothing more than combustibles soaked in petroleum, obtained from that country; for it is known that Greece received petroleum from the port of Phanagoria. In limited quantities it was known to the Chinese, probably many centuries before the beginning of the present Era. Their earliest records show a knowledge of it. It was probably not unknown in India at an early day, and to the Romans when they invaded the present territory of Galicia, of Moldavia, and of Wallachia, where it now is obtained in great quantities.⁵

² Mentioned by Herodotus, 450 B. C., as eight days' journey from Babylon.

³ They used liquid asphaltum in laying up stones.

⁴ Brannt on Petroleum, 20.

⁵ Brannt on Petroleum, 2.

§2. Early discoveries of petroleum in United States.

The Jesuit Fathers in this country in early times made mention of burning springs; which were nothing more than oil set afire that had accumulated on the surface of the water of springs — usually what may be termed stagnant springs. One of these writers was a Franciscan missionary, Joseph de la Roche d' Allion, who wrote a letter in 1629 describing such a spring, and which is printed in Sagard's *Histoire du Canada* in 1636.⁶ On Oil Creek, in Venango County, Pennsylvania, were to be seen in the first half of the present century a number of pits, fifteen or twenty feet across, some circular, some oval, and some square, carefully cribbed or walled up with timber or logs. In the bottom of these pits were growing trees, centuries old. The oil had preserved the timber with which they were walled. The theory has been advanced that they were constructed by that mysterious race which preceded the American Indian, who inhabited that region at the first discovery of America by the Europeans; and that that race was the same as the one which operated the copper mines of the Lake Superior country.⁷ As early as 1750 a French officer located at Fort Duquesne (the present site of Pittsburg), in a letter to General Montcalm, then located at Quebec, described oil found in a region which was evidently the region of Oil Creek as now known.⁸

"While descending the Allegany," said he, "fifteen leagues below the mouth of the Connewango, and three above the Venango, we were invited by the chief of the Senecas to attend a religious ceremony of his tribe. We landed, and drew up our canoes on a point where a small stream entered the river. The tribe appeared unusually solemn. We marched up the stream about half a league, where the company, a large band it appeared, had arrived some days before us. Gigantic hills besirt us on every side. The scene was really sublime. The great chief

⁶ On an old map of 1670, yet preserved, is marked a "Fontaine de Bitume," located near the present village of Cuba, New York.

⁷ Brannt on Petroleum. 4.

⁸ On "A General Map of the Mid-

dle Colonies of America." etc., by Lewis Evans, published at Philadelphia in 1755, the existence of petroleum in the present States of both Pennsylvania and Ohio is indicated.

then recited the conquests and heroism of their ancestors. The surface of the stream was covered with a thick scum, which, upon applying a torch at a given signal, burst into a complete conflagration. At the sight of the flames the Indians gave forth the triumphant shout that made the hills and valleys re-echo again. Here, then, is revived the ancient fire-worship of the East; here, then, are the children of the Sun." °

In 1784 Peter Kalm, a celebrated Swedish botanist landed in this country, and spent three years in travel. In 1753 and 1761 he published an account of his travels, in which he described the oil springs of Western Pennsylvania. In the latter part of the eighteenth century in the correspondence of that time, frequent mention is made of oil observed in springs and floating on water in Western Pennsylvania, Eastern Ohio, Western Virginia, and Eastern Kentucky.¹⁰ It is said that General Washington, in 1775, when visiting the Kanawha Valley, set aside to the public a square mile of land, on which was located a gas well, above Salt Lick; but a defect in the deed, afterwards discovered, rendered the conveyance void. As early as 1814, in Washington County, Ohio, thirty miles north of Marietta, in sinking a salt well, both petroleum and gas were found. A similar well was bored in 1819 in Wayne County, Kentucky, and it yielded so much black petroleum that it was abandoned. In 1829 a salt well bored near Burkesville, Cumberland County, of the same State, yielded great quantities of oil, estimated to amount to fifty thousand barrels up to 1860, most of which was lost. Some of it was sold as a medicine under the name of "American Oil." In 1840 a well at this place spouted oil at the rate of seventy-five gallons a minute for a short period. In 1857 oil was discovered by one Shaw, in Enniskillen township, in the Province of Western Ontario; and later a well was dug which proved to be a flowing one at the rate of fifty-five gallons a minute. The first flowing well was discovered January 11, 1862, on Black Creek, of that township. In 1854 petroleum springs were dis-

° Henry's History of Petroleum, 11.

¹⁰ Loskiel, in his "History of the United Brethren Among the Indians

in North America," in 1788, speaks at length of petroleum in Pennsylvania and Ohio. See the account in Brannt, p. 5.

covered fifteen miles west of Tulare Lake, California, by the United States Government officers.

§3. Early account of a western New York oil spring.

As early as 1833 Prof. Benjamin Silliman, Jr., of Yale College, visited an oil spring or pool in the western part of Allegany County, New York, and wrote a very interesting account of his visit and the result of his examination. The oil taken from this spring or pool was sold as "Seneca Oil" for medicinal purposes.

"The Oil Spring, as it is called," said he, "is situated in the western part of the County of Allegany, in the State of New York. This county is the third from Lake Erie on the south line of the State, the counties of Cattaraugus and Chautauqua lying west, and forming the southwestern termination of the State of New York. The Spring is very near the line which divides Allegany and Cattaraugus. Being in the County of Allegany, I was indebted to the kindness of a friend, who on the 6th of September took me from Angelica to the Spring. After crossing the Genesee River, our ride was to the town of Friendship, six miles; then to Cuba, eight miles; and thence into the township of Hinsdale, three and a half miles, making seventeen and a half miles from Belvidere, the county-seat of Phillip Church, Esq., and twenty-one miles from Angelica village. The place will be found without difficulty by taking a guide at Hick's tavern, which is on the corner of the road to Cuba where it is intersected by the road to Warsaw, two miles west of Cuba. The last half mile is in the forest; and a road is cut, for the greater part of the way, through the woods; but the path becomes finally an obscure foot-track in which a stranger without a guide might easily lose his way, or at least fail of finding the object of his search. The country is rather mountainous; but the road running between the ridges is very good, and leads through a cultivated region rich in soil and picturesque in scenery. Its geological character is the same with that which is known to prevail in this western region; a silicious sandstone, with shale, and in some places limestone is

the immediate basis of the country. The sandstone and shale (the limestone I did not see) lie in nearly horizontal strata. The sandstone is usually of a light gray color, and both it and the shale abound with entrocites, encrinites, corallines, terebratula, and other reliquæ, characteristic of the secondary transition formation. The Oil Spring or fountain rises in the midst of a marshy ground. It is a muddy and dirty pool of about eighteen feet in diameter, and is nearly circular in form. There is no outlet above ground, no stream flowing from it; and it is of course a stagnant water, with no other circulation than that which springs from the changes of temperature and from the gas and petroleum that are constantly rising on the surface of the pool. The water is covered with a thin layer of petroleum or mineral oil, giving it a foul appearance as if coated with dirty molasses, having a yellowish-brown color. Every part of the water was covered by this film, but it had nowhere the irradiance which I recollect to have observed at St. Catherine's well, a petroleum fountain near Edinburgh in Scotland. There the water was pellucid, and the hues produced by the oil were brilliant, giving the whole a beautiful appearance. The difference is, however, easily accounted for. St. Catherine's well is a lively, flowing fountain, and the quantity of petroleum is only sufficient to cover it partially, while there is nothing to soil the stream; in the present instance, the stagnation of the water, the comparative abundance of the petroleum and the mixture of leaves and sticks and other productions of a dense forest preclude any beautiful features. There are, however, upon this water, here and there, spots of what seems to be a purer petroleum probably recently risen, which is free from mixture, and which has a bright brownish-yellow appearance — lively and sparkling. Were the fountain covered entirely with this purer production, it would be beautiful. We were informed that when the fountain is frozen, there are always some air holes left open, and that in these petroleum collects in unusual abundance and purity, having distinctly the beautiful appearance which has just been mentioned as now occurring here and there upon the water. The cause of this is easily understood. The petroleum being protected by the ice from the impurities which at other times

fall into it, escapes contamination, and being diverted to the air holes both by its lightness and by the gas which mixes with it, collects there in greater quantity and purity. All the sticks and leaves, and the ground itself around the fountain, are rendered more or less adhesive by the petroleum. They collect the petroleum by skimming it like cream from a milk-pan. For this purpose they use a broad, flat board, made thin at one edge like a knife. It is moved flat upon and just under the surface of the water, and is soon covered by a coating of petroleum which is so thick and adhesive that it does not fall off, but is removed by scraping the instrument upon the lip of a cup. It has then a very foul appearance like very dirty tar or molasses; but it is purified by heating it, and straining it while hot through flannel or other woolen stuff. It is used by the people of the vicinity for sprains and rheumatism and for sores upon their horses. It is not monopolized by any one, but is carried away freely by all who care to collect it, and for this purpose the spring is frequently visited. I could not ascertain how much is annually obtained. But the quantity is considerable. It is said to rise more abundantly in hot weather than in cold. Gas is constantly escaping through the water, and appears in bubbles upon the surface. It becomes much more abundant, and rises in large volumes whenever the mud at the bottom is stirred by a pole. We had no means of collecting or of firing it; but there can be no doubt that it is the carburetted hydrogen — probably of the lighter kind, but rendered heavier and more odorous by holding a large portion of the petroleum in solution. Whenever it is examined we should expect, of course, to find carbonic acid gas mingled with it, and not improbably ozate or nitrogen. We could not learn that any one had attempted to fire the gas as it rises, or to kindle the film of petroleum upon the water. We were told that an intoxicated Indian had fallen into the pool and been drowned many years ago, but that his body had never been recovered. The story may be true, and if true, it would be a curious inquiry whether the antiseptic properties of petroleum so well exemplified in the Egyptian mummies may not have preserved his body from putrefaction. The history of this spring is not distinctly known. The Indians were well acquainted

with it, and a square mile around it is still reserved for the Senecas. As to the geological origin of the spring, it can scarcely admit of a doubt that it rises from beds of bituminous coal below. At what depth we know not, but probably far down. The formation is doubtless connected with the bituminous coal of the neighboring counties of Pennsylvania and of the west rather than with the anthracite beds of the central parts of Pennsylvania.”¹¹

§4. Washington county, Ohio, oil well.

An account was given in 1833 of the Washington County, Ohio, well, by Dr. S. P. Hildreth, of Marietta, which is of unusual interest at the present day.

“The greater abundance of stone coal in this locality,” said he, “than in that of the Muskingum, gives it a decided advantage in the elaboration of petroleum. On the latter river the wells afford but little oil, and that only during the time the process of boring is going on. It ceases soon after the wells are completed, and yet all of them abound more or less in gas. A well on Duck Creek, about thirty miles north of Marietta, owned by Mr. McKee, furnishes the greatest quantity of any in this region. It was dug in the year 1814, and is four hundred and seventy-five feet in depth. Salt water was reached at one hundred and eighty-five feet, but not in sufficient quantity. However, no more water was found below this depth. The rocks passed were similar to those on the Muskingum River, above the flint stratum, or like those between the flint and salt deposits at McConnellsville. A bed of coal two yards in thickness was found at the depth of one hundred feet, and gas at one hundred and forty-four feet, or forty-one feet above the salt rock. The hills are sandstone, based on lime, one hundred and fifty or two hundred feet in height, with abundant beds of stone coal near their feet. The oil from this well is discharged periodically, at intervals of from two to four days, and from three to

¹¹ American Journal of Science, 1833, set out in full in Henry's History of Petroleum, pp. 12-19.

six hours' duration at each period. Great quantities of gas accompany the discharges of oil, which for the first few years amounted to from thirty to sixty gallons at each eruption. The discharges at this time are less frequent and diminished in amount, affording only about a barrel per week, which is worth at the well from fifty to seventy-five cents a gallon. A few years ago, when oil was most abundant, a large quantity had been collected in a cistern holding thirty or forty barrels. At night some one engaged about the works approached the well-head with a lighted candle. The gas instantly became ignited, and communicated the flames to the contents of the cistern, which, giving way, suffered the oil to be discharged down a short declivity into the creek, where the water passes with a rapid current close to the well. The oil still continued to burn most furiously, and spreading itself along the surface of the stream for half a mile in extent, shot its flames to the tops of the highest trees, exhibiting the novel and perhaps never before witnessed spectacle of a river actually on fire." ¹²

§5. The first oil well in United States.

In 1853 George H. Bissell saw a bottle of crude petroleum in the office of Professor Crosby, of Dartmouth College. On examining it, he at once perceived its true value. He was engaged in the practice of law in New York City with J. G. Eveleth; and he proposed to his partner that they proceed at once to Titusville and inspect the territory. The result of this visit was that they, in 1854, purchased one hundred and five acres of Brewer, Watson & Company, and leased another tract of about the same size for ninety-nine years, for five thousand dollars. The deed bore date of November 10, 1854; and the land was situated on Oil Creek, in Cherrytree Township, Venango County, and covered the Island situated at the junction of Pine and Oil Creeks. On December 30, 1854, Jonathan G. Eveleth, George H. Bissell, James H. Salisbury and Dexter A. Hawkins of New York, Francis B. Brewer of Titusville and

¹² American Journal of Science. Henry's History of Petroleum, pp. July, 1833, set out nearly in full in 21-26.

Anson Sheldon of New Haven, Connecticut, organized and incorporated the Pennsylvania Rock Oil Company, the first oil company incorporated in America. On January 16, 1855, the territory above described was leased to the new oil company. Although the new company had its leases, there was an uncertainty how the oil should be developed; and the enterprise was allowed to drag. Professor Silliman had been given two hundred shares of stock in the new company, in order to make him president of it; but owing to the small amount of petroleum obtainable, he never expected much to come of the venture. Speaking of the plan of development, Mr. Henry says: "The idea came from another quarter, and was suggested by an incident as trifling as that which disclosed the law of gravitation. While seeking shelter beneath the awning of a Broadway drug store one scorching day in the summer of 1856, Mr. Bissell's eye fell upon a remarkable show-bill lying beside a bottle of 'Kier's Petroleum,' in the window. His attention was arrested by the singularity of displaying a four hundred dollar bank note in such a place; but a closer look disclosed to him the fact that it was only an advertisement of a substance in which he was deeply interested. He stepped in, and requested permission to examine it. The druggist took it from the window, and, having plenty of them, told him to keep it. For a moment he scanned it, scrutinizing the derricks, and remarking the depth from which the oil was drawn, when instantly, like an inspiration, it flashed upon him that this was the way their lands must be developed — by artesian wells." Nearly two years were allowed to elapse before arrangements were completed which enabled the Oil Company to send out a man to its leased territory to begin operations. They selected Mr. E. L. Drake, of New Haven, conductor on a passenger railway train, who came to be known in the history of oil operations as "Colonel Drake," to begin operations. He arrived in the future oil territory about May 1, 1858. Drake faced many difficulties when he arrived at the field of his future operations, among which was the want of ready money, the difficulty of finding suitable operators, and the novelty of the scheme. Mr. Kier, the patent medicine man of Pittsburg, had recommended to Mr. Bissell "Uncle Billy Smith" and his two

sons as suitable men; and they were brought to Titusville in June, 1859, when operations began. "Aggravating delays followed," says Mr. Henry. "In artesian boring it is necessary to begin on the rock to drill. This had been previously done by digging a common well-hole and cribbing it up with timber. When the rock is within a few feet of the surface it is still the cheapest and easiest method, but in some localities to do so would be practically impossible. They started to dig a hole, but it so persistently caved in and filled with water when they got a few feet below the surface, that Drake determined to give it up and try an experiment that had suggested itself to his mind. This was the driving of an iron tube through the quicksand and clay to the rock. If this is exclusively his own invention, which is probable, it is a pity he did not procure a patent on it. The royalty would have afforded him at least a competency, though the driving pipe is not so much in use as formerly." The operators in the oil region have had the benefit of this invention without any return, unless indeed we except the good feeling which prompted them to send him a present of \$4,200, when they heard he was sick and in need. "The pipe was successfully driven to the rock thirty-six feet, and about the middle of August the drill was started. The drillers averaged about three feet a day, making slight 'indications' all the way down. Saturday afternoon, August 28th, 1859, as Mr. Smith and his boys were about to quit for the day, the drill dropped into one of those crevices, common alike in oil and salt borings, a distance of about six inches, making the total depth of the whole well 69½ feet. They withdrew the tools, and all went home till Monday morning. On Sunday afternoon, however, 'Uncle Billy' went down to the well to reconnoitre, and peering in he could see a fluid within eight or ten feet of the surface. He plugged one end of a bit of tin water spout and let it down with a string. He drew it up filled with petroleum. That night the news reached the village, and Drake, when he came down next morning bright and early, found the old man and his boys proudly guarding the spot, with several barrels of petroleum standing about. The pump was at once adjusted, and the well commenced producing at the rate of about twenty-five barrels a day. The news spread

like lightning. The village was wild with excitement. The country people round about came pouring down to see the wonderful well. Mr. Watson jumped on a horse and hurried straightway to secure a lease of the spring on the McClintock farm near the mouth of the creek. Mr. Bissell, who had made arrangements to be informed of the result, by telegraph, bought up all the Pennsylvania rock-oil stock it was possible to get hold of, soon securing most of that owned in New Haven, and four days afterward was at the well."¹³ "This memorable strike," says Crew, "ushered in the Petroleum Era."¹⁴

§6. Other first oil wells in United States.

Naturally this great "find" of oil created tremendous excitement, and immediately suggested the putting down of other wells. The second well was put down in February, 1860, by Barnsdal, Meade and Rouse, to a depth of one hundred and sixty feet, resulting in a production of forty to fifty barrels daily. This well was on the Watson Flats, below Titusville. The third well was located on the afterwards famous McClintock farm. It was completed in the spring of 1860, and was sunk by a Mr. Angier for Brewer, Watson and Company. These wells had to be pumped. The first flowing well was produced in the summer of 1860, on the Buchanan farm near Rouseville, called

¹³ Henry's History of Petroleum.

¹⁴ Crew on Petroleum, 142.

Colonel Drake made considerable money in oil investments, but lost it all in New York City speculating in oil stocks. Becoming an invalid, he was taken by his wife to Vermont, with their children, and afterwards to the highlands of New Jersey, in order that he could have the benefit of the sea breeze. They lived in abject poverty, his wife supporting the family with her needle. With an effort she one day raised forty cents to enable him to go to New York City to see if he could not find something he could do or secure some aid. He met an old acquaintance from

Titusville, who gave him his dinner and furnished him money to return home. On arriving at Titusville this friend raised for him \$4.200 as a present. With the proceeds of this sum the family were enabled to live plainly but comfortably for several years. They settled in Bethlehem, Pa., and in 1873 that State provided for him a pension of \$1.500 a year for life, and in case his wife survived him, the pension to be continued to her during her life. Republics are not always ungenerous; nor are employers who reap vast fortunes by the labors of their servants always generous.

the "Curtis" well, but it soon filled with water and ceased to flow. The first permanent flowing well was situated on the Upper McElhenny Farm, and was completed in June, 1861, by Messrs. Phillip and Company. It was four hundred feet deep, and produced three hundred barrels per day for fifteen months, before it ceased to flow. The celebrated "Phillip's Well" was situated on the Tarr farm, and was completed November 14, 1861. It was a flowing well producing three thousand barrels daily, one day producing 3,940. The "Empire Well" produced the same amount. Wells were put down after August, 1859, as rapidly as the crude means of drilling them, and the remoteness from supplies, would permit. In September of that year crude oil brought twenty dollars a barrel in the oil region, but in November, 1861, it was only five cents, the lowest oil ever sold. In January, 1863, ten cents. This was due to the lack of facilities to transport it. After better facilities had been employed to get the crude oil to market the price arose, until July, 1864, it brought fourteen dollars a barrel.¹⁵

§7. In what countries petroleum found.

It is difficult to name all the countries in which petroleum has been discovered. It was known in ancient times that oil existed in the Echigo province of Japan, on the Japanese Sea. The springs there were called the "Evil Smelling Springs." Oil is still found in that province in great quantities. In Java there were in 1879 at least one hundred wells. In Borneo in 1899 was known a considerable field of oil, some of which was then worked. In Sumatra, in 1898, it was reported that the field was giving out. In Burmah are ancient oil wells, and many wells on the Irrawaddy River are in active operation. Near the

¹⁵ In 1854 it sold for \$1 a gallon. From 1859 to 1876 it has been estimated that 10,500 wells were drilled alone in Pennsylvania; and from a territory of an actual area of less than three miles on Oil Creek not less than \$110,000,000 of oil had been produced. In 1876 not over

500 barrels daily were taken out of the wells in Ohio and West Virginia. The two wells at Terre Haute, Indiana, in that year only produced 27 barrels per day. They were the only oil bearing wells in that State.

Bolan Pass in India petroleum was discovered in 1885; and at Sibi on the northwest frontier. It is also found in the Punjab regions, between Cashmere and Cabul. In Persia at Talish a petroleum spring has recently been discovered. On the eastern side of the Caspian Sea, on the Taman peninsula are vast deposits of oil; while on the western shore, immediately opposite, is the famous Baku district of Russia, once thought inexhaustible in both its oil and gas, but now showing signs of failure.¹⁶ On the shore of the Red Sea, at Djmsah, in the Orange Free State, and in Algiers, of Africa, oil is found in considerable quantities. Wells exist at Baico, Tintca and Campina in Roumania, with a capacity in 1890 of one thousand tons daily. Galicia is perhaps the greatest oil producing country of Europe. Oil is found in Moldavia, Wallachia, Albania and Dalmatia. It is found near Piacenza and Veleja, Italy. As we have already seen, oil is found in Sicily, in the Ionian Islands, probably at Genoa and in Sardinia, though in small quantities. It is also found in Alsace,¹⁷ in the valley of the Rhine near the village of Schwatwiler, having been discovered as early as 1835; also in Hanover, at Luneberg heath, south of Hamburg, near Hölle, in the Dithmerschen, Schleswig-Holstein, at Lobsaun and Bechelbronn;¹⁸ and in very small quantities in South France near the Pyrennes. Oil has been drawn from a well near Edinburg, Scotland, for many years; and we have already noted that it was known in Derbyshire, England, although in very small quantities. It has also been found at Worsley, at Wigan and West Leigh in Lancashire, and at Coalbrookdale and Wellington in Shropshire, but never in commercial quantities. Small quantities have been

¹⁶ Described by Masudi, who died in 950.

"On the confines towards Georgia," says Marco Polo, "there is a fountain from which oil springs in great abundance, insomuch that a hundred ship loads might be taken from it at one time. This oil is not good to use with food, but 'tis good to burn, and is also used to anoint camels that have

the mange. People come from vast distances to fetch it, for in all countries round about they have no other oil." 1. Yule-Cordier edition of Marco Polo's travels (ed. 1903), p. 49. This was written about 1272, and describes the now famous Baku district.

¹⁷ Used in the eighteenth century.

¹⁸ A deep shaft in search of oil was dug in 1735.

discovered in recent years in Australia ¹⁹ and in 1860 in New Zealand. At a place called Taranki, in the latter island, natural gas escapes from the ground. Oil is also found in the Hawaiian Islands. The oil lands of Peru are quite extensive in area, lying on the coast near the Pacific Ocean. It is likewise found in the Argentine Republic and in Bolivia. It is also found in great quantities in Ecuador, having been discovered by a priest in the eighteenth century. Near Tocuyo, Cap a dare and Curamichate, Venezuela, petroleum is likewise found. Small petroleum springs exist near Havana, Holquin and Mayri, of Cuba, in Santo Domingo, Trinidad and the Barbadoes. Near Papantla, in the State of Veracruz, Mexico, are several wells. We have already seen that oil exists in great quantities in Western Ontario; and gas has been piped in great quantities from that territory to Buffalo and Detroit. There is a small well near Gaspe, Quebec, but as late as 1897 it had not produced oil in paying quantities. The greatest oil field in the world, perhaps with the exception of the Baku district, was that of Western Pennsylvania. The fields of West Virginia, Kentucky, Ohio and Indiana have proven sources of great wealth; while Western New York, Eastern Tennessee, Louisiana, Texas and California have proven fine deposits of oil wealth. Variable quantities have been found in Michigan, Illinois, Missouri, Kansas, Indiana Territory, Oklahoma, Alabama, Nebraska, Wyoming, South Dakota, Colorado, New Mexico, Washington, Alaska, and the Northwest Territory of Canada.

§8. Natural gas known to ancients.

In boring wells for salt the Chinese in the district Tsien Luon Tsing discovered natural gas in very early times. Some of the wells are two thousand feet deep. The gas in recent times has been used, not only for the purpose of evaporating salt water, but for domestic purposes. It was conveyed to the place of consumption by bamboo pipes. When a well became ignited, and could not be otherwise extinguished, they accumulated a body of water of considerable size and suddenly precipitated it upon the

¹⁹ In 1889 near Yorktown.

burning well. As early as A. D. 615, gas wells were known in Japan. At least six hundred years before the birth of Christ the Magi of Asia were worshippers of the eternal fires that blazed from fissures in the mountains on the coast of the Caspian Sea. The region of these fires was on the Apsheron peninsula, situated between the Caspian and Euxine Seas, where great deposits of petroleum have been found in recent years. The adherents of the Parsees, a sect founded by Zoroaster, when they subjugated the tribes around the Caspian, adopted the fire-worship of the conquered. In A. D. 624 Heraclius proscribed their rites and destroyed their temple, ruins of which still exist; and twelve years later the country was conquered by the Mohammedans. Marco Polo describes this region in his travels, about 1272. At an early age burning gas was known in the vicinity of Genoa, Italy; and that city was formerly lighted with gas brought from the wells of Amiano or Miamo, in Parma. The famous "Fontaine Ardente," near Grenoble, France, was burning in the time of Julius Cæsar, as it had for ages before. At Wigan, Lancashire, England, is a gas or "burning well."

§9. Early natural gas in America.

The early discoverers of petroleum in this country must have noticed escaping gas in connection with the petroleum; and a few of them make mention of that fact. In 1815, at Charleston, West Virginia, gas was obtained from a salt well; and as early as 1841 it was used in the evaporation of brine in the manufacture of salt. In 1821, at Fredonia, Chautauqua County, New York, a woman going to a spring after night for water set down her lantern, and the spring immediately took fire from it. Investigation showed that gas in considerable quantities was escaping at that place. The same year a well was sunk in that town, on the bank of Canadaway Creek, near the Main Bridge, Fredonia, and sufficient gas obtained for thirty burners. On the occasion of General Lafayette's visit to that town in 1824 the Taylor House, an inn or hotel, was illuminated by means of the gas obtained from this well. The well was only twenty-seven feet deep; and in a few years it burned out. In 1850 it was

deepened to seventy feet. In 1858 a second well was bored, which furnished gas for two hundred burners. In 1871, a third was drilled to a depth of twelve hundred feet. As early as 1863 natural gas was used for manufacturing purposes at East Liverpool, Columbiana County, Ohio, and was used at an early date for lighting the streets, the use for that purpose probably being the first instance of the kind. In 1866 a gas well was bored near Kenyon College, Knox County, Ohio, six hundred feet deep. For several years the gas was allowed to escape, blazing fifteen feet high and three feet in diameter, before use was made of it. In 1854 the first gas well was bored (1,200 feet deep) in Erie, Pennsylvania; and at quite an early date gas was found in a well five hundred feet deep at West Bloomfield, New York, and which was piped to Rochester for illuminating purposes. In 1873 natural gas was used to light the town of Fairview, Pennsylvania; and the same year it was found flowing from the ground in the salt region above Marietta. In 1873 gas in great abundance was discovered on the Big Kanawha, above Charleston, and was used by the workmen to boil water and cook their dinners; and in the same year a well located in Armstrong County, Pennsylvania, furnished the first gas for a rolling mill. One year later a gas well of tremendous force was drilled at Murrysville, Pennsylvania, twenty miles from Pittsburgh; and for three years the gas was allowed to escape, no effort being made to check its flow. In 1876 the town of Titusville, Pennsylvania, was supplied for the first time with gas flowing at the rate of four million cubic feet a day, from a well seven hundred and eighty-six feet deep; and the same year gas was brought from Butler County, nineteen miles, to Pittsburgh, for use in a rolling mill. About this time the value of natural gas began to be appreciated; but so universal was the belief that it was inexhaustible that little effort was made to husband it until at the end of the next fifteen or twenty years, when its decline became so pronounced that the warning could no longer be disregarded if the full benefit of its use was to be preserved. It is safe to say that wherever petroleum is found, natural gas will be found in at least small quantities. In this country it has been found in abundance in Western

Ontario, Western New York, Western Pennsylvania, West Virginia, Eastern Kentucky, Ohio, Indiana, Texas, Southeastern Kansas and Southern Oregon. Probably the famous Baku district has shown a greater display of natural gas energy and supply than any other quarter of the globe. Quite recently it has been discovered in Sussex, England, near London.

§10. Sources and composition of petroleum and gas.

The origin of petroleum and natural gas is still a controverted question and one of speculation — an unsolved problem. At least four theories have been advanced, and have their several advocates. (1) That they are the result of the distillations from the greatly abundant accumulations of palæozoic seaweeds, the marks of which are still traceable in very many numerous instances in rocks. (2) That they are the result of the destruction of the innumerable multitude of coralloid sea animals, the skeletons of which make up a large part of limestone formations. (3) That they are the resultant of distillation of bituminous coal. (4) That they are, at least petroleum, referable in the language of Professor Orton, State Geologist of Ohio, “to peculiar decompositions chiefly of water and carbonic acid which are supposed to be carried on at considerable depths in the earth where these substances are brought into contact with metallic iron or with metallic bases of the alkalies at high temperature.”²⁰ The last two may be regarded as abandoned. In discussing the origin of petroleum and the several theories, Professor Orton advances the following argument: “They are most commonly referred to the agency of distillation. Destructive distillation consists in the decomposition of animal or vegetable substances at high temperatures in the absence of air. Gaseous and semi-liquid products are evolved, and a coke or carbon residue remains behind. The ‘high temperatures’ in the definition given above, must be understood to cover a considerable range, the lower limit of which may not exceed 400 or 500 degrees F. Petroleum and gas on the large scale are not the products of destructive distillation. If shales,

²⁰ Report on Oil and Gas, 1887, p. 9

sandstones or limestones holding large quantities of organic matter, as they often do, and buried at a considerable depth, should be subjected to volcanic heat in any way, there is no reason to doubt that petroleum and gas would result from this action. Without question, there are such cases in volcanic districts, but the regions of great petroleum production are remarkably free from all igneous intrusions, and from all signs of excessive or abnormal temperatures. All claims for an igneous origin of these substances are emphatically negated by the condition of the rocks that contain them. There is a statement of the distillation theory that had attained quite wide acceptance, which needs to be mentioned here. It is to the effect that these substances, oil and gas, have resulted from what is called "spontaneous distillation at low temperatures," and by low temperatures ordinary temperatures are meant. It does not, however, appear on what facts in nature or upon what artificial processes this claim is based. Destructive distillation is the only process known to science under the name of distillation which can account for the origin of oil or gas, and this does not go on at ordinary or low temperatures. A process that goes on at ordinary temperatures is certainly not destructive distillation. It may be chemical decomposition, but this process has a name and place of its own, and does not need to be masked under a new and misleading designation, such as spontaneous distillation. No help can come to us, therefore, from the adoption of the spontaneous distillation theory. It seems more probable that these substances result from the primary chemical decomposition of organic substances buried with the forming rocks, and that they are retained as petroleum in the rocks from the date of their formation. It is true that our knowledge of these processes is inadequate, but there are many facts on record that go to show that petroleum formation is not a lost art of nature, but that the work still goes on under favorable conditions. It is very likely true that, as in coal formation, the conditions most favorable for large production no longer occur, but enough remains to show the steps by which the work is done. The "spontaneous distillation" theory has probably some apparent support in the fact that must be men-

tioned here, viz: that where petroleum is stored in a rock, gas may be constantly escaping from it, constituting in part, the surface indications that we hear so much of in oil fields. The Ohio shale, for example, is a formation that yields along its outcrops oil and gas almost everywhere, but no recent origin is needed for either. The oil may be part of a primitive store, slowly escaping to the day, and the gas may be constantly derived from the partial breaking up of the oil that is held in the shales. The term "spontaneous distillation" might, with a little latitude, be applied to this last named stage, but it has nothing to do with the origin of either substance. While our knowledge of the formation of petroleum is still incomplete and inadequate, the following statements in regard to it are offered as embodying the most probable view:

1. Petroleum is derived from vegetable and animal substances that were deposited in or associated with the forming rocks.

2. Petroleum is not in any sense a product of destructive distillation, but is the result of a peculiar chemical decomposition by which the organic matter passes at once into this or allied products. It is the result of the primary decomposition of organic matter.

3. The organic matter still contained in the rocks can be converted into gas and oil by destructive distillation, but so far as we know, in no other way. It is not capable of furnishing any new supply of petroleum under normal conditions.

4. Petroleum is, in the main, contemporaneous with the rocks that contain it. It was formed at or about the time that these strata were deposited.

William T. Brannt, in his work on Petroleum, written in 1894, which is based upon the German work of Professor Hans Hoefler and Dr. Alexander Veith, gives the following conclusions²¹ as the result of his researches:

1. "Petroleum is of animal origin; saurians, fishes, cuttlefishes, coralloid animals, etc., especially have authentically contributed to its formation, though soft animals without solid frame, of which no authentic, determinable remains are left

²¹ Brannt on Petroleum, 163.

behind, may also have co-operated. While coal has been formed by the transformation of vegetable substances, petroleum and the allied bitumens originated from animal substances.

2. "It is still an unsolved problem whether petroleum could be formed from animal remains only under special conditions; neither is the nature of these conditions known.

3. "Petroleum has been formed in all ages of the earth's history of which animal remains exist. The Archæan strata are free from petroleum.

4. "Petroleum could accumulate and be preserved in the original deposit only, if during its formation it was shut off from escape.

5. "The formation of petroleum has been effected without the co-operation of an uncommonly high temperature, and,

6. "It has taken place under high pressure, the influence of which upon the chemical process is not known.

7. "The deposits of petroleum are partially original (primary) and partially secondary; the latter may be or were connected with the former.

"Concerning the formation of natural gas the same materials and similar processes as for the formation of petroleum may be presupposed. The accumulation of both also took place in the same spaces, frequently in such a manner that the gas occupied the higher, and the oil the lower sections of the same rock stratum. No process being known by which petroleum can be formed from natural gas, while the separation of the latter from the former — even at the ordinary — is a well known fact, it is very probable that petroleum is the primary and gas the secondary product."

§11. Composition of petroleum.

Naturally petroleum taken from different quarters of the world will vary in composition, but, in general, it may be said, it is a mixture of several hydrocarbons, and to contain also bituminous materials, sulphur, carbonaceous matter, sand and clay.²² The following table of the result of refining crude pe-

²² 9 Pop. Sci. Mon. 140; Crew on Petroleum, 165.

roleum was made as early as 1866; but it should be remembered that oil even from the same region will not always produce identical results. We give the table:

Gasoline	3 per cent.
Naphtha	10 "
Benzine	3 "
Illuminating Oil	75 "
Residuum	4 "
Coke and Loss	5 "
	100 "

A distinguished Russian chemist, Ludwig Nobel, has given the following as the result of refining crude petroleum taken from the Baku district:

	Benzine (light oil)	1 per cent.	
	Gasoline	3 "	
Lubricants	{	Kerosene (burning oil)	27 "
		Saliaroui	12 "
		Veregenni	10 "
		Lubricating	17 "
		Cylinder	5 "
		Vaseline	1 "
		Liquid fuel	14 "
		Lost in refining	10 "
		100 "	

The following table is taken from S. F. Peckham's Report on Petroleum (page 165) of the average percentages of commercial products obtained from crude petroleum from New York, Pennsylvania, Ohio and West Virginia:

Gasoline	1.5 per cent.
C—naphtha	10.0 "
B—naphtha	2.5 "
A—naphtha	2.5 "
Illuminating Oil	54.0 "
Lubricating Oil	17.5 "
Paraffin	2.0 "
Coke and Loss	10.0 "
	100.0 "

§12. Composition of natural gas.

Analyses of natural gas will necessarily differ, varying with the locality from which it is drawn. In the following table, prepared prior to 1888, one per cent. is unaccounted for, it will be noticed:

Marsh Gas	67	per cent.
Hydrogen	22	"
Ethylhydride	5	"
Nitrogen	3	"
Carbonic Acid	0 6/10	"
Carbonic Oxide	0 6/10	"
Oxygen	0 8/10	"
	<hr/>	
	99	"

An analysis of the natural gas of Fredonia showed the following results:

Nitrogen	9.54	per cent.
Carbondioxide	0.41	"
Hydrocarbons of the paraffin series.....	90.05	"
	<hr/>	
	100.00	"

Another analysis of Murrysville gas produced the following results:

Nitrogen	2.02	per cent.
Carbondioxide028	"
Oxygen	trace	
Paraffins	97.70	"
	<hr/>	
	100.00	"

Several analyses by Bunsen and Schmidt of the Caucasus natural gas give the following results:

Methane	92.49	93.09	92.24	97.57	95.56
Olefines	4.11	3.26	4.26	—	—
Carbonmonoxide	0.93	2.18	3.50	2.49	4.4
Hydrogen	0.94	0.98	—	—	—
Nitrogen	2.13	0.49	—	—	—

§13. Early attempts at distilling or refining petroleum.

As early as 1694 patents were granted in England for making "pitch, tar and oyle out of a kind of stone." In 1781 the Earl of Dundonald obtained oils from coal by the same process. As early as 1840 "coal oil," properly called, was distilled in France from bituminous shale. During the next ten years hundreds of experiments were made to successfully distill oil from coal and bog peat. E. W. Binney, the geologist, of Manchester, England, about 1847 called attention to the petroleum found at Riddings, near Alfreton in Derbyshire. The same year a patent had been granted to one Mansfield for "the improvement in the manufacture and purification of spiritous substances and oils applicable to the purposes of artificial light." James Young the same year began the distillation of a substance which he called "petroleum peat"; and three years later he and Binney having discovered a highly bituminous coal at Boghead, Scotland, established works for the purpose of distilling oil from it, and conducted them on an expensive scale for fifteen years. Several years after Binney had called attention to the petroleum at Riddings, he and James Young commenced the manufacture of illuminating oil from it, but the supply soon giving out, they began distilling oil from boghead peat, as above stated. Refineries to distill oil from coal were soon established in America under the English patents, which were taken out in this country in 1856, but afterwards overthrown by the courts as illegal. In 1851 petroleum on Oil Creek, Pennsylvania, was selling for seventy-five cents a gallon. It was tested by Messrs. Williams, Luther Atwood and Joshua Merrill at the United States Chemical Manufacturing Company's works at Waltham, near Boston, and very satisfactory results obtained; but the supply being very limited, little effort was made to manufacture and put it on the market. Small quantities of it, however, were put upon the market in 1852 and called "Coup-Oil," after the *coup d'etat* of Louis Napoleon. It was used as a lubricating oil. As early as 1855 petroleum was refined and offered for sale at Pittsburgh; but as the quantity was small, a market in that city was found for

the entire amount of the output. The manufacture created a demand for the crude product. In 1856 Joshua Merrill first made an illuminating oil from Trinidad bitumen. In 1853 George H. Bissell, having seen a bottle of crude petroleum in the office of Professor Crosby of Dartmouth College, that had been sent to him as a curiosity by Dr. Brewer of Titusville, Pennsylvania, taken from the banks of Oil Creek, procured another bottle of it directly from that region, and submitted it in the spring of 1855 to Professor Benjamin Silliman, Jr., the eminent chemist of Yale College, who made a report upon it April 16, 1855, that has become a classic in the history of petroleum.²³ From that moment the success of distilling illuminating oil from crude petroleum was established, and refineries began to spring up as soon as the supply warranted their construction and the process of refining became known. One of the earliest was situated on Hunter's Point, Long Island, and probably the most celebrated at Bayonne, New Jersey.²⁴

§14. Early use of petroleum as a medicine.

The first use made of petroleum was as a medicine. The Indians of Western New York mixed it with clay and smeared or painted their faces with the mixture, producing a hideous effect. It was gathered by the whites and sold as a medicine, as already stated. It was sold under the name of Seneca Oil, American Oil, afterward as Harlem Oil. About 1849, Mr. Samuel M. Kier of Pittsburgh conceived the idea of putting it in bottles and selling it as a specific for all the ills to which flesh is heir. He procured a few barrels from his father's salt wells in Allegheny County, and placed upon the bottle the following label or advertisement:

" Kier's

Petroleum or Rock Oil, celebrated for wonderful curative powers. A natural remedy. Procured from a well in Allegheny Co., Pa. four hundred feet below the Earth's

²³ See Henry's History of Petroleum for this report.

²⁴ The name "Kerosene" took its name from the celebrated Downer

Kerosene Works, located at Boston. The term "Kerosene" was a trade mark. Crew on Petroleum, 136.

surface. Put up and sold by Samuel M. Kier, 363 Liberty Street, Pittsburg, Penn.

Price 50 cents."

He sold three barrels a day; but in three years the demand for it having declined, he turned his attention to distilling the crude oil and in a measure was successful. "Barbados Tar" was another production of petroleum used as a medicine. At the present day valuable medicinal products have been made from petroleum, such as filtered paraffin residues sold under the names of cosmoline, vaseline, petroline, and the like.

§15. Transportation.

In Asia petroleum is transported in the most primitive manner when not by water. In the Baku district it was transported in casks placed above and slung under the axle of a two-wheeled cart, the wheels often being seven feet in diameter. When oil was first discovered on Oil Creek, Pennsylvania, the only means of carrying it out of that region was by the use of wagons to haul it to navigable streams of water. As the quantity to be transported soon became very great, hundreds of wagons were in use, resulting in bringing about a condition of the country dirt roads scarcely without parallel. The demand for transportation was greater than the supply resulting in very high prices, as high as three dollars a barrel being charged for hauling a barrel four miles. Many a wagoner laid up a comfortable sum for the future. The oil was at first placed in barrels that cost \$3.50 apiece, a barrel that today in that region would not cost over one dollar. These barrels were made of heavy oak staves, hooped with iron, and coated on the inside with glue; but as the crude oil had in it some water, the glue coating did not prove a complete protection, and the loss through leakage was very considerable. Oil Creek and Allegheny River were the only channels through which petroleum could be carried to a market. On reaching the creek the barrels were placed on rafts and floated down to the Allegheny, if the supply of water would permit it. The expedient of damming the stream at a number of places and releasing the water suddenly

was adopted. Often the accumulations of these rafts or boats were many, and when the pond-freshets came and the boats were turned loose in the stream, there being no means of controlling them, the loss was at times very great, arising from confusion and frequent collisions and wreckages. At one time the loss was estimated at from 20,000 to 30,000 barrels. The empty boats were towed up the stream again by horses, driven along the banks of the creek, but more frequently in its bed or channel. At Oil City the barrels were transferred to boats and steamers. At one time more than one thousand boats and thirty steamers were engaged in the oil traffic at this place, resulting in frequent collisions and jams, to the great loss of shippers. During a freshet in May, 1864, the loss was over 25,000 barrels. Bulk barges were soon introduced on the Allegheny and Ohio Rivers, but as they frequently careened, because of the oil shifting, the loss was considerable. To remedy this, the oil space was cut into apartments or rooms, to prevent the shifting. The railroads early saw their opportunity, and entered the oil region. During the latter half of the year 1865 they introduced the tank car. At first they took an ordinary flat car, placed upon it two tanks of four thousand gallons each, and securely fastened it down. In 1870 or 1871 tanks of boiler iron were introduced, which have continued in use until the present day, cars being purposely constructed for them. Transportation of so bulky a product as crude oil by means of wagon and rafts and the use of barrels was evidently too expensive; and as early as the autumn of 1860 S. D. Karns of Parkersburg, West Virginia, suggested the practicability of transporting it in pipes laid on or in the ground. In 1862 J. L. Hutchinson ran a line of pipe on the celebrated Tarr farm over a high hill to the first refinery in the oil region, depending upon the principle of a syphon to carry the oil; but the line was a failure. In 1863 he laid a pipe line from the famous Sherman well to the terminus of the railroad on the Miller farm, a distance of three miles, depending upon hydraulic pressure; and although one thousand barrels were emptied into the line at its beginning, only fifty reached their destination. Pumps were resorted to, but on account of the inadequacy of the pipe

joints, the loss of the oil was too great to transport it in this manner. After a trial of two years the line was abandoned. In 1865 Samuel Van Syckle, by joining the pipes with screw and thimble, laid a line from the Miller farm to Pithole, a distance of four miles. The pipe was laid two feet in the ground; and the ascent from the farm to Pithole was six hundred feet. By the application of pumps oil was easily delivered at Pithole. This was the first successful pipe line. The teamsters realized that their business was seriously threatened; and they did just what the half-civilized oil haulers of the Baku district did when the Nobel Brothers first introduced a pipe line in that district — they tore up the line and broke it in pieces as fast as he could lay it. He placed armed watchmen along the entire line, just as was afterwards done in the Baku district; and after many sanguinary conflicts with the teamsters, maintained his pipe line. A second line was completed the next Spring, running from Benninghoff to the Shaffer farm. As early as 1877 there were ten pipe lines in the oil region. The construction of the long distance lines was begun in 1880, and several were extended until they reached the sea-board, one even passed through Central Park in New York City at Sixty-fourth street, in order to reach the refinery on Hunter's Point, Long Island. There are now many hundred miles of pipe lines in use in the United States. In Russia their use is very common. Oil is shipped to foreign countries by steamers especially built for that purpose, having their holds cut into many apartments to prevent the oil shifting and sinking the vessels. Some of these steamers carry over one and a half million gallons. This method of transportation has been in use many years on the Caspian Sea.

§16. The first oil lease.

We give, as a curiosity, a copy of the first oil lease. The spring leased was situated in the famous Oil Creek region of Pennsylvania:

“Agreed this fourth day of July, A. D. 1853, with J. D. Angier of Cherrytree Township, in the County of Venango, Pa., that he shall repair

up and keep in order the old oil spring on land in said Cherrytree Township, or dig and make new springs, and the expenses to be deducted out of the proceeds of the oil, and the balance, if any, to be equally divided, the one-half to J. D. Angier and the other half to Brewer, Watson & Co., for the full term of five years from this date. If profitable.

"BREWER, WATSON & Co.

"J. D. ANGIER." ²⁵

§17. Early use of artificial illuminating gas.

The earliest known use of artificial gas for illuminating purposes was in 1787 when Lord Dundonald of England obtained gas from coal tar, and occasionally used it for lighting up the hall of Culross Abbey. In 1792 William Murdoch, residing at Redruth, Cornwall, succeeded in demonstrating that an illuminating gas could be obtained from coal; and in 1797 publicly showed his system as he had matured it. One year later he was employed in the famous Soho workshop of Boulton and Watt, located at Birmingham, England; and he fitted up an apparatus in that establishment for the manufacture of gas, with which it was partly lighted. Shortly after his apparatus was extended and gas manufactured for other establishments of that manufacturing city. In 1801 M. Lebon of Paris introduced into his house gas distilled from wood. Through the efforts of F. A. Winsor of London, the Lyceum Theatre of that city was lighted with gas in 1803. The first employment of gas for street lighting was January 28, 1807, when Pall Mall, London, was lighted. In 1810 Parliament passed an Act authorizing the incorporation of a gas-light company; and two years later the first gas-light company was incorporated, called the "Chartered Gas-light and Coke Company." Westminster bridge was lighted with gas in 1813, for the first time; and the next year the streets of Westminster. In 1816 London was lighted with it; and so rapidly did it advance that by 1820 many of the principal cities of the kingdom, as well as Paris and some other cities on the Continent, were lighted by its use. It was used in many large workshops and public buildings. It found its way into private houses very slowly; one of the rea-

²⁵ Henry's History of Petroleum, 60.

sons for its slow progress arose from the annoyance occasioned by it escaping from ill-fitted pipes, and the other, and perhaps justly so in a large measure, from apprehension of the danger attending its use. By 1829 there were 200 gas works in Great Britain. In the United States gas was first used for lighting in Newport, Rhode Island, in 1806, David Melville making and using it in his house and in the street in front of it. In 1813 he took out a patent on its manufacture, and lighted several large factories. Four years later his process was applied to Beaver Tail light-house, that being the first instance where gas was used in a light-house lantern. In 1816 an attempt was made to manufacture gas for lighting purposes in Baltimore, but the attempt was a failure, and success was not attained until 1821. The next year it was introduced into Boston. In 1823 the New York Gas-light Company was formed, but because of the little demand for gas it did not begin active operations until 1827. Three years later, success having been assured, the Manhattan Company was organized, which entered the field as a competitor of the New York Company. Until 1849 both companies made their gas from oil or rosin. Gas was not introduced into Philadelphia until 1835. From 1824 to 1828 the New York Gas-light Company manufactured gas from oil exclusively, and sold the product at \$10 per 1,000 feet. The gas manufactured by this company from rosin from 1828 to 1848 was sold by it at \$7 per 1,000 feet. Wood gas was used at the Philadelphia gas works as late as 1856.

CHAPTER II.

LEGAL STATUS OF OIL AND NATURAL GAS.

- §18. Oil and natural gas a mineral.
- §19. Part of realty.
- §20. Ownership in earth.
- §21. Compared with animals *ferae naturae*.
- §22. When title vests in owner.
- §23. Ownership of oil differs from that of water.
- §24. Owner of land has only a qualified ownership.
- §25. Qualified ownership in oil.— Power of legislature.
- §26. Severance of oil or gas from realty.
- §27. Recovery of severed product.— Trover.
- §28. Wasting gas.— Injunction.
- §29. Increasing flow of gas by pumping well.
- §30. Pumping oil wells.
- §31. Exploding nitroglycerin in well to increase flow.
- §32. Maliciously boring well to injure another.
- §33. Measure of damages for unlawfully taking oil and gas from the soil.
- §34. When lessee acquires title to oil.
- §35. Waste.— Part of realty.— Reservation.
- §36. Partition.
- §37. Oil and gas not synonymous.
- §38. "Other valuable volatile substances."
- §39. Natural gas not heat.
- §40. Gas and oil an article of commerce.
- §41. Judicial notice.
- §42. Judicial knowledge of oil and gas properties.
- §43. Plugging wells.
- §44. Not subject to tariff law of 1890.
- §45. Entry of government oil lands.
- §46. Property in oil tanks or pipe lines.— Larceny.

§18. Oil and natural gas a mineral.

Whatever may have been thought of oil or natural gas at one time,¹ it is now established beyond any question that oil or petroleum and natural gas are minerals, and judicially must be so

¹ *Dunham v. Kirkpatrick*, 101 Pa. St. 43.

treated.² Whether or not natural gas is a mineral was presented in a Canadian case, and ably discussed. The question arose on the construction of a section of the Municipal Act. The clause construed was as follows: "The corporation of any township or county, wherever minerals are found, may sell, or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient to do so." The question was whether this sentence covered natural gas, and it was decided that it did.³ It was also held that this statute authorized the leasing of a highway for the purpose of drilling for gas.⁴

§19. Part of realty.

Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle at least, as the casing of a well or a pipe line, they must be treated as a part of the realty underneath the surface of which they lie.⁵ So much so are they

² Murray v. Allard, 100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740; Kelley v. Ohio Oil Co., 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721, affirming 6 Ohio C. Ct. Dec. 470; 9 Ohio C. C. 511; 34 Wkly. L. Bull. 185; Wilson v. Youst, 43 W. Va. 826; 28 S. E. Rep. 781; 39 L. R. A. 292; Funk v. Halde- man, 53 Pa. St. 229; Thompson v. Noble, 3 Pittsb. 201; 17 Pittsb. L. Jr. 45; Stoughton's Appeal, 88 Pa. St. 198; Roberts v. Jepson, 4 Land Dec. 60; Piru Oil Co. 16 Land Dec. 117; Ontario Natural Gas Co. v. Gosfield, 18 Ont. App. 626; 38 Am. and Eng. Corp. 253; Brown v. Spill- man, 155 U. S. 665; 15 Sup. Ct. Rep. 245; People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Hail v. Reed, 15 B. Mon. 479; 11 Morr. Min. Rep. 103;

Hughes v. United Lines, 119 N. Y. 423; 23 N. E. Rep. 1042; Westmore- land, etc., Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; Given v. State (Ind.), 66 N. E. Rep. 750.

³ Ontario Natural Gas Co. v. Smart, 19 Ont. Rep. 595.

⁴ Ontario Natural Gas Co. v. Gas- field, 18 Ont. App. rep. 626; 38 Am. and Eng. Corp. Cas. 253; see Gesner v. Cairns, 2 Allen (N. B.), 595; and Gesner v. Gas Co., James Rep. (N. B.), 72; *In re* Buffalo Natural Gas Co., 73 Fed. Rep. 191; Maxwell v. Brierly, 10 Copp. L. D. 50; Roberts v. Jepson, 4 L. D. 60.

⁵ Hail v. Reed, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; Columbian Oil Co. v. Blake, 13 Inu. App. 680; 42 N. E. Rep. 234; People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Brown v. Spill-

KEESLING & KEESLING

LEGAL STATUS.

33

a part of the realty, as we shall repeatedly see hereafter, that a conveyance of them in their natural state in the earth requires all the formalities of a conveyance of any other interest in the same real estate.⁶ A reservation of "all mines, minerals and metals in and under" a tract of land is a reservation of the oil and gas.⁷

§20. Ownership in earth.

The owner of the surface is the owner of the gas and oil beneath it; but if they escape into the land of another he ceases to be the owner of them. They are the subject of grant or conveyance, just as much so as the grant or conveyance of coal or stone buried in the soil of the same tract of land.⁸

§21. Compared with animals *ferae naturae*.

In seeking for analogous conditions in the law, courts have compared natural gas and oil to that of animals *ferae naturae*. The Supreme Court of Pennsylvania made this comparison in a case that has become a leading authority wherever the subject of gas and oil is discussed. "Water and oil," said the court,

man, 155 U. S. 665; 15 Sup. Ct. Rep. 245; Acheson v. Stevenson, 146 Pa. St. 299; 23 Atl. Rep. 331, 396; Williamson v. Jones, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222; Stoughton's Appeal, 88 Pa. St. 198; Funk v. Haldeman, 53 Pa. St. 229.

⁶ Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; American Window Glass Co. v. Williams (Ind. App.), 66 N. E. Rep. 912.

⁷ Murray v. Allard, 100 Tenn. 100; 43 S. W. Rep. 353; 39 L. R. A. 249; 66 Am. St. Rep. 740.

⁸ Hall v. Reed, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Manufacturer, etc., Co. v. Indiana, etc., Co., 155 Ind. 461; 57 N. E. Rep.

912; 57 L. R. A. 768; State v. Ohio Oil Co., 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 585; Townsend v. State, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; Hughes v. United Pipe Lines, 119 N. Y. 423; 23 N. E. Rep. 1042; Keir v. Peterson, 41 Pa. St. 357; Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; Acheson v. Stevenson, 146 Pa. St. 299; 23 Atl. Rep. 331, 336; Hague v. Wheeler, 157 Pa. St. 324; 27 Atl. Rep. 714; 22 L. R. A. 141; Wood County, etc., Co. v. West Virginia, etc., Co., 28 W. Va. 210; Williamson v. Jones, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222.

“and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their ‘fugitive and wandering existence within the limits of a particular tract is uncertain.’⁹ They belong to the owner of the land and are part of it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours but his.”¹⁰

§22. When title vests in owner.

It has been said repeatedly by the courts and writers that the owner of the soil owns the gas and oil beneath its surface; and expressions to this effect will be found in this work. This is an acknowledgment of the absolute ownership of the gas and oil beneath the surface by the owner of the land.¹¹ But under the Indiana decisions, which have met with the approval of the Supreme Court of the United States,¹² the owner of the land has only a qualified right to the oil and gas beneath the surface — the right to reduce it to possession and to exclude all others exercising the right on the premises — and title in him to it does not vest until he has reduced it to actual possession, either by bringing it into a well or into a pipe line, or into a tank or other receptacle in case of oil. Until that has happened the gas or oil by natural forces may escape from his land, be reduced to possession by another, and become his property.¹³

⁹ Quoting from *Brown v. Vandergrift*, 80 Pa. St. 147.

¹⁰ *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93; *People’s Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37

L. R. A. 294; *Lowther Oil Co. v. Miller* (W. Va.), 44 S. E. Rep. 433.

¹¹ See *Jones v. Forest Oil Co.*, 194 Pa. St. 379; 44 Atl. Rep. 1074; 30 Pittsb. L. J. (N. S.) 58; 48 L. R. A. 748.

¹² *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 585.

¹³ *State v. Ohio Oil Co.*, 150 Ind.

§23. Ownership of oil differs from that of water.

The ownership of oil, however, is not identical with the ownership of water. It is true both are regarded as minerals, and are also regarded as liquids; in this respect they are legally and physically identical.

“The second ground of defense,” said the Court of Appeals of Kentucky, “relies upon the fact that the oil was taken from a well bored down to a running stream of oil, which was vague and fugitive, and had not been confined, nor ever reduced to possession, nor ever in possession of plaintiffs. And in support of this ground we are presented with a very ingenious argument, founded on the principles laid down by elementary authors with respect to water, which Blackstone says must unavoidably remain in common, susceptible only of a usufructuary property, belonging to the first occupant during the time he holds possession of them, and no longer. Whence it is argued that this oil, being a liquid like water, and flowing, as alleged in a stream at the bottom of this well, was common to all, susceptible only of a usufructuary property, and that the particular portion of it now in contest belonged to the defendants, as the first occupants and appropriators of it. But it is to be observed that the portion of Blackstone to which reference is made, is a treatise upon property in general; that is, upon the principles on which the right of property in external things depends, and which he states especially with respect to water, the broad principles applicable to the subject in its most general aspect, without reference to any distinctions or discriminations by which they might be modified. Then, besides the fact that water is not oil, and that while nature furnishes the former almost everywhere, for the common use of man, as being a universal necessity, she furnishes the latter, for the most part, only as the result of arduous labor and intricate processes, and but rarely produces it in its perfect state; it is to be remarked that water itself, though found generally running upon the surface

21; 49 N. E. Rep. 809; 47 L. R. A. N. E. Rep. 912; 50 L. R. A. 768; 627; *Manufacturer, etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 Townsend v. State. 147 Ind. 624; 47 N. E. Rep. 21; 37 L. R. A. 294.

of the earth, where it may be obtained for use by merely taking it, and where, being furnished by nature for the use of all who may conveniently use it, it is only to be appropriated by use and for use, yet it is also frequently found under the surface, and obtained or reached at great expense and labor, by means of wells by which it is intended to be appropriated. This discrimination is not made, nor was it necessary for the purposes of the author that it should be made in the general view which he was taking of property in general. The very title of the chapter, and the nature of his observations, would lead to the conclusion that he was speaking of water as it is furnished by nature for the ordinary use of man, and as it is commonly found running upon the surface of the earth. The very fact that, after illustrating the principle of property being founded on occupancy and on labor, by reference to the well made by one of the ancient patriarchs, he takes no notice of wells when he comes to treat of water as a subject of property, shows that he thought only of water on the surface, or that he considered a well by which it might be obtained from beneath the surface as a means of appropriation. The other authorities referred to treat especially of water on the surface; the first, considering the subject under the title of running waters, and showing that he is considering water running over land, and the other treating the subject under the title of water courses, and both stating chiefly the rights of riparian owners. The latter, however, treats specially, though briefly, of springs, as to which he says the owner of land is entitled to all advantages arising from it, and may use a spring found upon it, as he does any other property, without regard to the convenience or advantage of others. And that this right is very different from the right of the owner of an estate through which water flows. What becomes, then, of the common right of all to the use of the water in the spring, if it may be thus exclusively claimed and used and owned by the owner of the soil? And if the water in a spring found on his land is thus his exclusive property, there seems to be much more reason to say that water at the bottom of a well which he has by his labor and expense constructed for the very purpose of retaining water in it for his use, and of facilitating the access to

it, is his exclusive property. And still stronger is the reason for considering him as the exclusive owner of oil, a peculiar liquid not necessary nor indeed suitable for the common use of man, and for reaching and obtaining which for its proper uses and for profit, he has constructed a well with suitable fixtures. It is indeed said in the answer, though it is scarcely to be seen in the evidence, that this well is bored down to a stream of oil. But while there are but slight traces even of a seeping of oil through the well, it is neither alleged nor proved that the well presents no obstruction to the stream or flow of oil, or that it does not hold or retain at least a portion of it, for facility in drawing it out. We know that in wells for drawing water it is usual, and, where the supply is small, necessary to sink the well below the point where the water enters it, so that it may be retained there in sufficient quantities for use, and for drawing it up. There is nothing to show that this was not the case in the present instance, and the jury might have so found. But we are of opinion that whether the water or oil is running through the well in a stream or not, that which is actually in the well is, while it is there, and subject to be drawn out, though it be there only in passing from one side of it to the other, appropriated by the owner to his own use, and belongs to him when it is drawn out, unless this is done by his license and for another's use. If, as may be presumed, the well is sunk below the point at which the water or oil enters, or if the water or oil, in any quantity, stands in it until drawn out, the evidence of appropriation is still stronger, and the right of the owner more easily established. And in either case, the water or oil, if drawn up by a wrong-doer, is the property of the person entitled to the well, or its exclusive use, and may be specifically recovered. Whether the barrels in which the wrong-doer has placed it may also be recovered with the oil, or other barrels should be furnished by the owner, we need not at present decide." ¹⁴

§24. Owner of land has only a qualified ownership.

The Supreme Court of Indiana, while having repeatedly referred to the fact that the ownership of oil and gas is compared

¹⁴ *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103.

with the ownership of animals *ferae naturae*, has pointed out that the owner of land does not own the wild animals that may be upon it until he has reduced them to actual possession, although he has the right to prohibit any one else taking them so long as they remain on his land. That court quotes from a Minnesota case ¹⁵ with respect to the ownership of wild animals, in which it is said: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietors, but in its sovereign capacity as the representative, and for the benefit, of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also by imposing limitations upon the right of property in such game after it has been reduced to possession." After having made this quotation, and also referring to the fact that it had likened the ownership of natural gas and oil to the ownership of wild beasts, the Indiana court said:

"There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found, or in the waters of which the fish are found. And there is no such thing in such laws to the effect that after title has once vested by actual reduction to possession, that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogy of the law, than to say that wild animals or fowls in 'their fugitive and wandering existence,' in passing over the land, become the property of the owner

¹⁵ State v. Rodman, 58 Minn. 393; 59 N. W. Rep. 1098.

of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land are a part of the land, and are the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the Act from which we have quoted is not violative of the Constitution, as an unwarranted interference with private property." ¹⁶

§25. Qualified ownership in oil.— Power of legislature.

The case from which the quotation has been made in the next preceding section was carried to the Supreme Court of the United States; and in affirming it that court used the following language:

“ If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the ‘negative community’; in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from

¹⁶ *State v. Ohio Oil Co.*, 150 Ind. Rep. 585; *People's Gas Co. v. Tyner*, 21; 49 N. E. Rep. 809; 47 L. R. A. 131 Ind. 277; 31 N. E. Rep. 60; 16 627; affirmed *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct.

his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take place until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things, *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the States as to property of that character. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise

from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners, without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common reservoir of supply, then as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this, although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may divest all the others of their rights without wrong-doing, but the lawmaking power cannot protect

all the owners in their enjoyment without violating the Constitution of the United States."¹⁷

§26. Severance of oil or gas from realty.

In instances of solid minerals the severance of them by artificial means renders them personal property, the ownership of which is presumptively in the owner of the land, or if the land has been leased for mining purposes, in the lessee.¹⁸ But if a wrong-doer with felonious intent sever the mineral and take it away, his act is not a larceny, but merely a trespass.¹⁹ If the act of severance be at one time, and the carrying away at another, the taking will, however, be larceny.²⁰ The act of severance and the act of carrying away must be a continuing one, without separation; for if it is not, the severed mineral becomes the personal property of the owner of the realty.²¹ It matters not that the mineral is severed by a stranger; for in such an instance it becomes as much personal property as if the owner had severed it;²² and still remains the property of the land owner.²³ All that has been said of solid minerals is true of oil and gas. As soon as they are severed from the earth they become personal property.²⁴ Whenever oil or gas is brought to

¹⁷ *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 585; *Given v. State (Ind.)*, 66 N. E. Rep. 750; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co. (Ind. App.)*, 66 N. E. Rep. 782; *Lowther Oil Co. v. Miller, etc., Co. (W. Va.)*, 44 S. E. Rep. 453.

For waste of artesian water, see *Huber v. Merkel (Wis.)*, 94 N. W. Rep. 354.

¹⁸ *Leport v. Mining Co.*, 3 N. J. L. J. 280; *Brown v. Morris*, 83 N. C. 251; *Watts v. Tibbals*, 6 Pa. St. 447; *Rhoades v. Patrick*, 27 Pa. St. 323; *Lyon v. Grorley*, 53 Pa. St. 261; *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Noble v. Sylvester*, 42 Vt. 146; *Forbes v. Gracey*, 94 U. S. 762.

¹⁹ *People v. Williams*, 35 Cal. 671; *Commonwealth v. Steinling*, 156 Pa. St. 400; 27 Atl. Rep. 297; *State v. Burt*, 64 N. C. 619.

²⁰ *Commonwealth v. Steinling*, *supra*.

²¹ *Commonwealth v. Steinling*, *supra*.

²² *Attersoll v. Stevens*, 1 Taunt 183.

²³ *Hughes v. United Pipe Lines*, 119 N. Y. 423; 23 N. E. Rep. 1042.

²⁴ *Stoughton's Appeal*, 88 Pa. St. 198; *Shepherd v. McClamont Oil Co.*, 38 Hun 37; *Hail v. Reed*, 15 B. Mon. 479; 11 Morr. Min. Rep. 103; *Hughes v. United Pipe Lines*, *supra*; *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526.

the surface and confined in tanks or pipe lines it becomes personal property of the owner of the well.²⁵ If a lessee own the well, it is his property, unless the land owner is entitled to a specific part, in which event, they own it jointly until a division is made.²⁶ If oil or gas be taken from the real estate, it still belongs to the owner of the land or the lessee, as the case may be.²⁷

§27. Recovery of severed product.—Trover.

The owner of the land, or the lessee of it, from which oil has been taken may recover possession of it wherever he can find it; and for that purpose an action of replevin will lie;²⁸ or he may bring an action in trover.²⁹ A purchaser of oil wrongfully taken from the soil gains no title to it; and the owner of the land may pursue and recover it or its value wherever he may find it.³⁰ Even a purchaser from a person who took the oil from land under a license from a co-tenant is liable for its conversion, the same as the person who took it.³¹ In the case of a life estate, the remainderman who is in being and would take the estate if the life estate were extinguished, will be entitled to the possession of all the oil taken by the life tenant or by a stranger from wells sunk after the life estate was created.³² But neither replevin nor trover will lie against a pipe line company for the value of oil taken from land by one in adverse

²⁵ Kelly v. Ohio Oil Co., 57 Ohio St. 317; 49 N. E. Rep. 390; 39 L. R. A. 765; 63 Am. St. Rep. 721; State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237.

²⁶ Carter v. County Court, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725.

²⁷ Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; Hughes v. United Pipe Lines, *supra*.

²⁸ Williamson v. Jones, 43 W. Va.

562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; Omaha, etc., Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925.

²⁹ Hail v. Reed, 15 B. Mon. 470; 11 Morr. Min. Rep. 103; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147. *Contra*, Kier v. Peterson, 41 Pa. St. 357.

³⁰ Hughes v. United Pipe Lines, 119 N. Y. 423; 23 N. E. Rep. 1042.

³¹ Omaha, etc., Co. v. Tabor, *supra*.

³² Williamson v. Jones, *supra*.

possession of such land, and delivered to the company for transportation.³³

§28. Wasting gas.— Injunction.

So strongly is the notion of absolute ownership of the gas and oil in the land by the owner of it, beneath which it is found, embedded in our law, that without the aid of a statute the owner of such land cannot be prevented from wasting it by the owner of the adjoining premises. In the case of gas where two wells are placed within a few feet of each other it is clear that they draw gas from the same reservoir; and this is true, of course, when a boundary line between two tracts of land run between them. If, therefore, the owner of one of the wells persist in leaving his well open, not using the gas, it is quite manifest that the gas under the surface of the tract, or under a portion of it, on which the well is not situated, will be drawn off and wasted. And yet, with the notions of absolute ownership prevailing with respect to gas beneath the surface of land, a court of equity will not enjoin the waste, unless some positive statute forbid it.³⁴ But where a statute forbade such a waste of gas, it was held that the State, in its sovereign capacity, could enjoin the waste; and the statute was upheld on the theory that the land owner had no title to the gas or oil beneath the surface of the tract of land he owns, except the right to drill on his own land to take it into his possession; and as long as he had no title to it, the legislature had the right to prescribe the mode of taking it.³⁵

³³ *Giffin v. Southwest, etc., Lines*, 172 Pa. St. 580; 33 Atl. Rep. 578. See *Anderson v. Hapler*, 34 Ill. 436.

³⁴ *Hague v. Wheeler*, 157 Pa. St. 324; 33 W. N. C. 83; 27 Atl. Rep. 714; 22 L. R. A. 141; *Jones v. Forest City Oil Co.*, 104 Pa. St. 379; 44 Atl. 1074; 48 L. R. A. 748; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721, affirming 9 Ohio C. C. Rep. 511; 38 Wkly. L. B. 299;

39 Wkly L. Bull. 54. See 6 Ohio Cir. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186.

³⁵ *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 585; *Given v. State (Ind.)*, 66 N. E. Rep. 750; *Richmond, etc., Co. v. Enterprise, etc., Co. (Ind. App.)*, 66 N. E. Rep. 782.

The State also has the power to prevent the waste of gas by the use of Flambeau Burners.³⁶

§29. Increasing flow of gas by pumping well.

While every land owner has the right to bore for gas on his own land, and to use such portion of it as rises by natural laws to the surface in his wells or flows into his pipes, yet an adjoining owner, at least, has no right to induce an unnatural flow into or through his well, or do any act with reference to the common reservoir and the gas in it, injurious to or calculated to destroy it; and an action may be maintained by the owners of the superincumbent lands to enjoin another owner from using devices for pumping, or any other artificial process, that shall have the effect of increasing the natural flow of the gas.³⁷ In an earlier Indiana case a different rule was adopted.³⁸ In the more recent Indiana case the following language was used in discussing this question:

“Natural gas is a fluid mineral substance, subterranean in its origin and location, possessing, in a restricted degree, the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes, the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent. If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of land owners, and other persons interested in it, should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting in-

³⁶ *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; *Given v. State*, *supra*; *Richmond, etc., Co. v. Enterprise, etc., Co.*, *supra*.

³⁷ *Manufacturers', etc., Co. v. In-*

diana, etc., Co., 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768.

³⁸ *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443.

terests in this new and peculiar fluid. Natural gas being confined within limited territorial areas, and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense, or to the same extent, as animals *ferae naturae*, and the like, are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it, or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and enjoyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment and control, of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state, at least in a qualified degree, one of the characteristics or attributes of private property. In the case of animals *ferae naturae*, fish, and the like, this public interest is said to be represented by the sovereign or State. So, in the case of navigable rivers and public highways, the State, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas, there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the State. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as when left to the natural laws of flowage may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners to induce an unnatural flow into, or through his own wells, or to do any act with reference to the common reference to the common reservoir, and body of gas therein, injurious to, or calculated to destroy it. In the case of lakes, or flowing streams, it cannot be said that any particular part, or quantity, or proportion of the water in them belongs to any particular land or riparian owner, each having an equal right to

take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to, or destructive of, the common source from which the gas is drawn. The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there."³⁹

§30. Pumping oil wells.

It is clear that the doctrine of the Indiana cases has its limitations, and must not be carried too far. For in the case of oil wells, if pumps cannot be used, little oil can be taken out, and the land as an oil territory is practically useless. It is practically immaterial whether a gas well can be pumped if gas cannot be otherwise obtained; for when it becomes necessary to pump a gas well in order to get gas out of it, it is of no value whatever as a gas well. But in the case of oil wells, hundreds if not thousands are pumped every day; and if the right to use a pump to get oil from them did not exist, few would ever be drilled. We think the right to pump them clearly exists.⁴⁰ It should be borne in mind that in the Indiana cases in which the right to use a pump was discussed, the court had before it the right to pump a gas well, and not an oil well.⁴¹

§31. Exploding nitroglycerin in well to increase flow.

The owner of a well has the right to explode nitroglycerin or other explosive in a well to increase the flow of gas or oil, even

³⁹ *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 768; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* (Ind. App.), 66 N. E. Rep. 782. In this last case it was held that no offence was committed where the pump did not destroy the back pressure of the gas, and so did not create a suction in

the well, consequently not increasing the natural flow.

⁴⁰ *Jones v. Forest Oil Co.*, 194 Pa. St. 379; 44 Atl. Rep. 1074; 48 L. R. A. 748.

⁴¹ See *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 155 Ind. 461; 57 N. E. Rep. 912; 50 L. R. A. 767; *Manufacturers', etc., Co. v. Indiana, etc., Co.*, 156 Ind. 679; 58 N. E. Rep. 706; 53 L. R. A. 134.

though he thereby may, or actually does, draw away the gas or oil in the adjoining territory.⁴²

§32. Maliciously boring well to injure another.

No one has the right to use his property for the sole purpose of injuring another. Such a right is not incident to ownership, and the right to use property in that way does not extend that far. So no one has the right to dig a well solely to drain another's water well. Such an act in law is malicious.⁴³ What is true of a well of water is true of a gas or oil well. If the owner of land sink an oil or gas well on his own land for the sole purpose of injuring the oil or gas well of another, and it has that effect, he may be restrained by injunction.⁴⁴

§33. Measure of damages for unlawfully taking oil and gas from the soil.

If oil has been unlawfully taken from the soil, the owner, whoever he may be, has the option either to recover the oil or its value.⁴⁵ Where the act of taking is a trespass, according to one line of cases concerning solid minerals, the wrong-doer is not entitled to be credited with the cost of taking out the mineral, if he knew it belonged to the plaintiff.⁴⁶ Another line

⁴² *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443.

The lessee is not bound to resort to exploding nitroglycerin in a well he has drilled, in order to obtain oil or gas and comply with his duty to use diligence in the development of the premises, especially so where there is little probability that the explosion would produce paying results. *Rice v. Ege*, 42 Fed. Rep. 661. See *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep. 178.

⁴³ *Chasemore v. Richards*, 7 H. L. Cas. 349; 2 H. and N. 168; 29 L. J. Exch. 81; 5 Jur. (N. S.) 873; 7

W. R. 685; *Rideout v. Knox*, 148 Mass. 368; 19 N. E. Rep. 390.

⁴⁴ Dictum in *Hague v. Wheeler*, 157 Pa. St. 324; 33 W. N. C. 83; 27 Atl. Rep. 714; 22 L. R. A. 141.

⁴⁵ *Buckley v. Kenyon*, 10 East 139.

⁴⁶ The cases we cite are cases with respect to solid minerals. *Martin v. Porter*, 5 M. and W. 352; 2 H. and H. 70; *Benson, etc., Co. v. Alta, etc., Co.*, 145 U. S. 428; 12 Sup. Ct. Rep. 877; *Bennett v. Thompson*, 13 Ired. L. 146; *Kock v. Maryland Coal Co.*, 68 Md. 125; 11 Atl. Rep. 700; *Jegon v. Vivian*, L. R. 6 Ch. App. 742; 40 L. J. Ch. 389; 19 W. R. 365; *McLean County Coal Co. v.*

of cases holds, in case of solid minerals, that the measure of damages is the value of the mineral as it existed in place before it was broken down.⁴⁷ It must be patent, however, to every one that the last rule cannot be applied to a case of oil or gas, because of the impossibility of determining the value of either gas or oil *in situ*. In the case of a wilful or negligent trespass the rule should follow the rule first above enumerated, and the trespasser charged with the value of the oil or gas taken, without any deduction for the cost of taking it out; but if the trespasser was innocent of the fact that he was such, and is not guilty of negligence in entering upon the ground and taking the oil or gas, the cost of extracting it should be allowed him. This is the general rule where the trespasser is innocent of any intent to do wrong, or has not been guilty of negligence.⁴⁸

§34. When lessee acquires title to oil.

A mere lessee — one who has no interest in the land itself, as a grantee beneath the surface — does not acquire title to the oil in the leased premises until it has been taken from the ground.⁴⁹ In passing on this case the court said:

“It will be observed that there is, by the terms of the lease no grant of the oil as it exists in the earth, so that there is no

Long, 81 Ill. 359; Wild v. Holt, 9 M. and W. 672; 1 D. N. S. 876; 11 L. J. Exch. 285; Morgan v. Powell, 9 M. and W. 672; Baker v. Hart, 123 N. Y. 470; 25 N. E. Rep. 948.

Another line of cases hold that the measure of damages is the value of the mineral after severance and before removal. Llynvi Coal Co. v. Brogden, L. R. 11; Eq. 183; 40 L. J. Ch. 46; 24 L. T. 612; Robertson v. Jones, 71 Ill. 405; Sunnyside Coal Co. v. Reitz, 14 Ind. App. 478; 43 N. E. Rep. 46; Thomas, etc., Co. v. Herter, 60 Ill. App. 58; Illinois, etc., Ry. Co. v. Ogle, 82 Ill. 627; Barton Coal Co. v. Cox, 39 Md. 1; Franklin Coal Co. v. McMillan, 49 Md. 549.

⁴⁷ Wood v. Morewood, 3 Q. B. 440, note; Hilton v. Woods, L. R. 4 Eq.

432; 36 L. J. Ch. 491; 16 L. T. 736; 15 W. R. 1105; *In re* United Merthyr Coal Co., L. R. 15; Eq. 46; 21 W. R. 117; Livingston v. Rawyards, 5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357; Powell v. Aikin, 4 Kay and J. 343; Cheesman v. Shreve, 40 Fed. Rep. 787; Colorado, etc., Co. v. Turck, 70 Fed. Rep. 294; Golden Reward Mining Co. v. Buxton, 97 Fed. Rep. 413; Durant Mining Co. v. Percy, etc., Co., 93 Fed. Rep. 166.

⁴⁸ Dyke v. National Transit Co., 22 N. Y. App. Div. 360; 49 N. Y. Supp. 180.

⁴⁹ Wagner v. Mallory, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526; Lowther Oil Co. v. Miller, etc., Co. (W. Va.), 44 S. E. Rep. 433.

passing of the title to the oil as it exists in its natural state, but that the right is limited to the mining and excavating, or the pumping and raising, of the oil from the premises. It is a right to produce or extract the oil from the earth, yielding one-eighth thereof to the landlord. What was his right? Was it real estate or personal property? It is said that leases of this character are incorporeal hereditaments, and that petroleum oil is a mineral, and is a part of the royalty like coal, iron and copper. It is true, it is a mineral substance; but it widely differs from the minerals mentioned, which are solids, having a fixed location in the earth, like the rock itself. Petroleum oil is a fluid found in the porous sand rock of the earth. In some instances it doubtless exists in pools, but where are the pools located? They may be under the lands in which the well is drilled. They may be in the abutting or remote lands, and may drain into the wells through seams or crevices in the rock, and then be extracted from the earth and reduced to possession by the operator. In this respect oil resembles water as it exists in the earth — especially salt and mineral waters, which have a market value — and is largely governed by the same rule of law. It consequently was held at a very early day in the history of the petroleum oil production that a man could not be restrained by his abutting neighbor from boring for oil upon his own premises, although he located his well within a few feet of the line, and would necessarily drain the oil from his neighbor's land, if any existed therein. We consequently are of the opinion that no title to the oil vested in the lessee until it had been taken from the ground and reduced to possession."

§35. Waste,— part of realty. — Reservation.

Where a tenant for life was taking out oil and gas, it was held that such oil and gas formed a part of the realty, that he could not drill wells in order to take out the oil or gas,⁵⁰ and that drilling a well and taking out gas or oil was an act of waste

⁵⁰ Although he could use the wells drilled before the life estate was established.

within the legal definition of that term.⁵¹ So in the case of an infant's lands, the guardian cannot drill a well, extract the oil or gas and sell it; nor can he dispose of it by way of lease or otherwise.⁵² The same is true of a guardian of an insane or incompetent person.⁵³ A conveyance of real estate, but reserving "all mines, minerals and metals in and under the land," is a reservation of the oil and gas.⁵⁴ A demise or conveyance of a tract of land, but reserving ten acres near the dwelling house on which no wells shall be drilled, is a conveyance of the oil and gas under the ten acres.⁵⁵ As between the first lessee and a second one where the latter takes out oil or gas without the consent of the first, such oil or gas must be treated, before it is extracted, as a part of the realty and the taking out of it as a waste.⁵⁶ It is not waste, however, for a land owner to put down wells near his boundary lines, though the effect be to draw the oil from beneath the surface of the adjoining land owned by another.⁵⁷ To extract it unlawfully is an irreparable injury which to stop or prevent injunction lies.⁵⁸

§36. Partition.

The grantee of a mere mining right cannot maintain an action for partition as against his grantor.⁵⁹ Nor can the owners of mineral rights in oil and gas have partition, for the reason that neither gas nor oil is capable of distinct ownership so long as it is in place. Today they may form a part of the premises of the land occupied by their owner, but tomorrow they may have

⁵¹ *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891; *Marshall v. Mellon*, 179 Pa. St. 371; 36 Atl. Rep. 201; 35 L. R. A. 816.

⁵² *Stoughton's Appeal*, 88 Pa. St. 198.

⁵³ *South Pennsylvania Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. Rep. 922.

⁵⁴ *Murray v. Allard*, 100 Tenn. 100; 43 S. W. Rep. 353; 39 L. R. A. 249; 66 Am. St. Rep. 740.

⁵⁵ *Brown v. Spilman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245.

⁵⁶ *Bettman v. Harness*, 42 W. Va. 443; 26 S. E. Rep. 271; 36 L. R. A. 566.

⁵⁷ *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 765.

⁵⁸ *Moore v. Jennings*, 47 W. Va. 181; 34 S. E. Rep. 793.

⁵⁹ *Smith v. Cooley*, 65 Cal. 46.

escaped and formed a part of the adjoining or even other land, without the volition or any act of their owners.⁶⁰

§37. Oil and gas not synonymous.

Oil and gas are not synonymous; and a lease for oil purposes does not embrace the right to take gas. If the lease requires the production of oil, the production of gas will not satisfy the covenant requiring a development, within a certain time, of the territory for oil.⁶¹

§38. "Other valuable volatile substances."

Where the phrase "other valuable volatile substances" was used in a lease in connection with the words "petroleum, rock or carbon oil," the court ordered the issue to be tried by a jury, whether or not natural gas was included in the words first quoted, for the reason that the words have no well defined meaning, and are ambiguous.⁶²

§39. Natural gas not heat.

Natural gas is not heat within the meaning of a statute providing for the incorporation of companies to supply heat.⁶³

§40. Gas and oil an article of commerce.

Both gas and oil are articles of commerce when severed from the soil, not, however, while remaining in it. When gas is carried from State to State it is an article of interstate commerce, though carried in pipe lines, as much so as coal, iron ore or any

⁶⁰ Hall v. Vernon, 47 W. Va. 295; 34 S. E. Rep. 764; 49 L. R. A. 464. See Carter v. Tyler County Court, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725.

⁶¹ Palmer v. Truby, 136 Pa. St. 556; 20 Atl. Rep. 516; Taylor v.

Peerless Refining Co., 7 Ohio Dec. 368; 14 Ohio C. C. 315.

⁶² Ford v. Buchanan, 111 Pa. St. 31; 2 Atl. Rep. 339.

⁶³ Emerson v. Commonwealth, 108 Pa. St. 126; Lebanon Gas Co. v. Lebanon Fuel, etc., Co., 5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223.

other mineral; and no greater restrictions can be laid upon it than can be laid upon solid minerals severed from the soil, or any other article of commerce. The carriage of oil and gas beyond the boundaries of that State cannot be prohibited.⁶⁴

§41. Judicial notice.

Courts will take judicial notice of the properties of petroleum and natural gas, and that the latter is a highly inflammable and dangerous substance.⁶⁵ They will not, however, presume or take judicial notice that gas confined in an iron pipe, is, in that condition, a dangerous element and liable to explode.⁶⁶ So the courts will take notice of the methods of operating for oil and gas, the means of their conduct to the points of consumption, and the facts of the odor and noise incident to their production.⁶⁷ Courts will also take judicial notice that coal oil is inflammable;⁶⁸ but they will not take judicial notice that kerosene oil is a refined coal oil, or a refined earth oil,⁶⁹ or a "burning fluid" or "chemical oil" as such words are used in a policy of insurance forbidding the use of such articles on the insured premises.⁷⁰ Where the Legislature had declared that certain grades and qualities of kerosene are proper and safe to use, it was decided that judicial notice could not be invoked to establish that kerosene used in a certain case was in fact inflam-

⁶⁴ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237; 2 Inter St. Com. Rep. 758. See *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307; *West Virginia Transportation Co. v. Volcanic Oil and Coal Co.*, 5 W. Va. 382; *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1.

⁶⁵ *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; *Alexandria, etc., Co. v. Irish*, 16 Ind. App. 534; 44 N. E. Rep. 680; *Mississinewa Mining Co. v. Patton*, 129 Ind. 472; 28 N. L. Rep. 1113;

28 Am. St. Rep. 203; *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487.

A court will not take judicial notice that dry, fine coal dust is dangerous and an explosive element. *Cherokee, etc., Co. v. Wilson*, 47 Kan. 460; 28 Pac. Rep. 178.

⁶⁶ *Indiana, etc., Co. v. Jones, supra*.

⁶⁷ *Brown v. Spilman*, 155 U. S. 670; 15 Sup. Ct. Rep. 245.

⁶⁸ *State v. Hayes*, 78 Mo. 307.

⁶⁹ *Bennett v. North British, etc., Ins. Co.*, 8 Daly 471.

⁷⁰ *Mark v. National Fire Ins. Co.*, 24 Hun 565; affirmed 91 N. Y. 663.

mable or explosive.⁷¹ Nor will the courts take judicial notice that gin and turpentine are inflammable liquids, within the meaning of that term as used in an insurance policy that provides it shall be void if "inflammable liquids" are kept on the premises.⁷²

§42. Judicial knowledge of oil and gas properties.

"It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying it is pierced by the drill, the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining and quarrying the solid minerals."⁷³

§43. Plugging wells.

The state has the power to compel the owner of a disused or abandoned well to plug it, so gas will not escape into the open

⁷¹ Wood v. N. W. Ins. Co., 46 N. Y. 421.

⁷³ Wettengel v. Gormley, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am.

⁷² Mosley v. Vermont, etc., Ins. Co., 55 Vt. 142. St. Rep. 733.

air, and thereby the gas not only be wasted, but the natural reservoirs be flooded with salt water to the destruction of the gas and the practical destruction of the oil.⁷⁴

§44. Not subject to tariff law of 1890.

Under the tariff law of 1890 natural gas imported as a fuel is not subject to a tariff duty under that clause of the statute providing that all imports of crude bitumen or crude mineral shall be admitted free; nor is it dutiable under the section providing that all raw or unmanufactured material not enumerated shall be dutiable.⁷⁵

§45. Entry of government oil lands.

By Acts of Congress of August 4, 1894, and of February 11, 1897, oil lands can be entered as placer mining claims.⁷⁶ "The premises in controversy are oil-bearing lands, the government title to which, under existing laws can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."⁷⁷

§46. Property in oil in tanks or pipelines.—Larceny.

The presumption is that the person delivering oil to a pipeline company is the owner of it; and if the company deny his

⁷⁴ *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 1055; 47 L. R. A. 627; *Ohio Oil Co. v. Indiana*, 177 U. S. 180; 20 Sup. Ct. Rep. 576; *State v. Oak Harbor Gas Co.*, 53 Ohio St. 347; 41 N. E. Rep. 584; reversing 34 Wkly. L. Bull. 221; 18 Ohio C. Ct. Rep. 751; 1 Toledo Leg. News, 474; 4 Ohio C. C. 158; *Given v. State (Ind.)*, 66 N. E. Rep. 750.

⁷⁵ *United States v. Buffalo, etc., Co.*, 172 U. S. 339; 19 Sup. Ct. Rep. 200; affirming 78 Fed. Rep. 110; 45 U. S. App. 345; 24 C. C. A. 4.

⁷⁶ See Land Office Circular, Oct. 12, 1892, 15 Land Dec. 760. and Instructions, 23 Land Dec. 322. For

Act of 1897, see 29 Stat. at Large, 526, 2 Supp. R. S. 549.

⁷⁷ *Gird v. California Oil Co.*, 60 Fed. Rep. 531. This decision was rendered before the two Acts referred to above had been adopted. The Land Department at Washington, after much fluctuation, had reached the same conclusion. *Union Oil Co.*, on review, 25 Land Dec. 351. See *In re Piru Oil Co.*, 16 L. D. 117; *Roberts vs. Jepson*, 4 L. D. 60; *Maxwell v. Brierly*, 10 Copps L. D. 50; *Ex parte Union Oil Co.*, 23 Land Dec. 222; *In re A. A. Dewey*, 9 Copps L. O. 51; *Dewey v. Rogers*, 2 Land Dec. 707; *In re Rogers*, 4 Land Dec. 284.

ownership, it has the burden of proving it.⁷⁸ Oil in a tank may be pledged; and a written order to the owner's agent in charge of the oil to hold it to the order of the pledgee as collateral security for a named sum of money transfers the oil to the pledgee on the agent's acceptance of such order.⁷⁹ Where B, the owner of several hundred barrels of oil in the pipes and tanks of the Union Pipe Line Company, delivered two orders on the company for the oil, which he had accepted, to the firm of H. & B. and took from them a receipt containing an agreement by them to hold the oil for storage at five cents a barrel per month, the oil at the time being in the tanks or pipe lines of the pipe-line company and undistinguishable from other oil in them; and H. & B. deposited the two orders to the credit of their general account with the pipe-line company, and afterwards deposited and drew until they became embarrassed, and, to meet their obligations, continued to draw on their balances on the books of the pipe-line company until they failed, it was held that they were guilty of larceny as bailees, on failure to comply with the demand of B. for a re-delivery of the oil. It was considered that the delivery of the receipts was a delivery of the oil and constituted a bailment, and H. & B. having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny. The court said:

“ In the consideration of the questions involved in this case, we cannot close our eyes to the total revolution in the manner of doing business, which has been brought about by the discovery of petroleum in this State. It has developed a new industry of vast importance. Methods for conducting it have been devised and put in operation, which were wholly unknown when the cases I have cited were decided. Instead of oil being hauled a long distance from the well to a market or shipping station, and there stored in barrels or in tanks in a merchant's ware-rooms, it is now turned at once by the producer into the pipes of the Pipe-Line Company, and thence conducted to the line of the railroad or canal for shipment, or may be in said pipes, or the

⁷⁸ *Enterprise Oil and Gas Co. v. National Transit Co.*, 172 Pa. St. 421; 33 Atl. Rep. 637.

⁷⁹ *First National Bank v. Harkness*, 42 W. Va. 156; 24 S. E. Rep. 548; 32 L. R. A. 408.

tanks connected therewith. Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the precise counterpart of every other barrel contained therein. It differs neither in quantity, quality or price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe-Line Company. . . . Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts that the property passes; that the orders drawn to them are the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. . . . How can these defendants allege with reason that as to them there was no delivery, when, in point of fact, they drew the oil out of the pipes and applied it to the payment of their debts? If it had not been drawn out, it would have been in the pipes still to meet the demand of the prosecutor. Even if delivery of the orders was not a complete delivery of the oil at that time, such delivery became complete when the defendants drew it out, or enabled others to draw it out by a transfer of the orders. It would render the law contemptible in the eyes of the business men, were it to say that there was no delivery of this oil when, as a matter of fact, there was a delivery for all the purposes of trade and commerce; such a delivery as enabled the defendants to sell it and apply the proceeds to the payment of their debts." And further: "If there was a delivery of the oil, of which we have no doubt, it follows necessarily that there was a bailment. This brings us to the further question whether the defendants fraudulently converted it to their own use. This point is free from difficulty. It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is, *prima facie*, evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion. . . . In the case of a bailment, therefore, so far as the intent to defraud may be regarded as of the essence of the crime, it must be presumed from the unlawful conversion. If I deposit my pocketbook for safe keeping over night with my landlord, and he opens it and converts the contents to his own

use, he is a thief both in law and in morals. Nor does it matter that he parted with it to pay his debt under stress of an execution, with the intention of restoring it to me ultimately. . . . But it is said that the defendants were bankers in oil, and that the case resembled that of the ordinary banker who receives money upon deposit. It is difficult to see the analogy. By the laws and the usage of banking, the depositor who makes a general deposit of his money becomes a mere creditor of the banker. The money becomes property of the banker. He has a right to use it in his legitimate business. He may loan it out to his customers upon such security and upon such terms as are usual with bankers. No such state of facts exists here. The defendants acquired no property in nor right to use the prosecutor's oil. . . . They had no right to lay their hands upon the property of the prosecutor, confided to them for safe keeping, in order to relieve themselves." ⁸⁰

⁸⁰ *Hutchison v. Com.*, 82 Pa. St. 472.

CHAPTER III.

OIL AND GAS LEASES.

- §47. Peculiarity.
- §48. Name applied to instrument does not determine its legal effect.
- §49. *Lex loci* governs.
- §50. License and incorporeal hereditaments.
- §51. Interest of lessee is a chattel real.
- §52. Contract giving interest in real estate.
- §53. Estate does not vest if oil or gas not found.
- §54. Vesting title subject to condition precedent.— Diligence.
- §55. Tenancy from year to year or at will.
- §56. Unilateral contract.
- §57. Legal interest of lessee in various leases.— Digest.
- §58. Sale of oil and gas, and not a lease.
- §59. Presumption as to ownership of oil or gas in ground.
- §60. Administrator's right to lease or contract.— Presumption.
- §61. Lease and not a license.
- §62. License.
- §63. License.— Consideration.— Revocation.
- §64. License, revocation.
- §65. Merger.
- §66. Consideration.
- §67. Option to purchase after development.
- §68. Option to extend lease.
- §69. Acceptance of second lease by lessee in first lease.
- §70. Extension of time of lease may amount to a new lease.
- §71. Options.— Revocation.
- §72. Options continued.
- §73. Option to pay rent or drill well.
- §74. Appurtenances, what will pass as such.
- §75. Statute of Frauds.
- §76. Description of leased premises.
- §77. Right of lessor to use surface.
- §78. Construction.
- §79. Construction of instrument by parties.
- §80. Unfilled blanks.— Written and printed clauses.
- §81. Execution of lease.
- §82. Defective execution or acknowledgment.
- §83. Parol change of written lease.
- §84. Acceptance.— Estoppel.

- §85. Lessee need not sign lease.—Deed.
- §86. Separate owners giving joint lease.
- §87. Notice to one of several lessees.
- §88. Second lease.— Notice.
- §89. Agent of lessee may take lease after forfeiture.
- §90. Exclusive right of licensee of lessee.— Solid mineral oil.
- §91. Implied covenant.
- §92. Covenant running with land.
- §93. Personal covenants.
- §94. Assignment of contract giving interest in land.—Incorporeal hereditament.— Lease.— Surrender.
- §95. Lessee liable after assignment on express covenants.
- §96. When work must be begun.
- §97. Diligence in operating leased premises after development.
- §98. Agreement as to what constitutes due diligence.
- §99. Unprofitable lease.
- §100. Lessor cannot impair value of lease by drilling wells on his own land.
- §101. Lessee draining premises by operations on adjoining territory.
- §102. Drilling well near boundary line.
- §103. Injunction.— Quieting title.
- §104. Damages.
- §105. Damages for failure to keep covenant.
- §106. Damages for neglect to develop or operate leased premises.
- §107. Damages for neglect to operate.— *Res judicata*.
- §108. Damages for taking oil or gas.
- §109. Boundaries.— Location of wells.
- §110. Selection of site.
- §111. Number of wells.
- §112. Number of wells.— Protecting lines.
- §113. Test wells.— Excuse for not drilling.
- §114. Test well, when need not be drilled.
- §115. Test well.— Depth.
- §116. Lessor and lessee by mistake locating well on stranger's land.
- §117. "Shooting" well.
- §118. Oil lease, who entitled to gas.
- §119. Oil lease gives no right to gas if oil be not found.
- §120. Eviction.— Ejectment.
- §121. Failure of title, reimbursement of operator.
- §122. Lessee denying tenancy.
- §123. Uncertainty on lease.— Unconscionable.
- §124. Diameter of wells.
- §125. Contract to drill wells "in the vicinity."

§47. Peculiarity.

Gas and oil leases are a part by themselves. There is scarcely any comparison between them and the ordinary farm or house

lease; although there is some resemblance in them to coal or solid mineral leases. Usually an oil or gas lease is for a term of a certain number of years, upon a nominal consideration, sometimes with the privilege of an extension of the term at the option of the lessee, or as long as gas or oil is found in paying quantities; contains a description of the leased territory, and a reservation of a certain number of acres around the buildings, when any are on the leased premises, where no wells shall be drilled; if the boundaries of the reservation are not fixed, provides that they shall be fixed by one of the parties, usually the owner of the land; provides for a part of the oil produced as a royalty or consideration for the lease, except for operating purposes, delivered in tanks or pipe lines to the credit of the lessor; provides, in case only gas should be discovered, for the payment of a certain sum periodically, for each well, if the gas be found in a quantity to justify transporting it off the premises to a market, of which fact the lessee is sometimes made the exclusive judge; the growing crops and the fences, not to be unnecessarily disturbed; gives the lessee or grantee the right to enter on the premises at any time to drill wells, and a right of way to and from the wells, the right to lay pipe lines to carry off the gas and oil, the right to remove all fixtures used in the drilling and operation of the wells, at the termination of the lease or grant; the lessee agreeing to commence a well within a certain time, and in case of a failure to do so to pay for any future delay a certain sum periodically (frequently so much per acre of the entire tract) as a rental until a well is commenced or the premises abandoned, the amount thus paid not infrequently made a full consideration and payment for the yearly delay until a well shall be commenced; and provides that a failure to commence a well or to make the payments within the specified time shall render the lease void. We say these are the usual terms. There are often many others: such as a thirty days' notice on the part of the lessee or grantee of his determination to terminate or surrender the lease; or that a second or other wells shall be drilled within a specified time after the first well is drilled, and if not, the lease to be void or forfeited; or that the lessor or grantor is to receive so much gas free of charge, giving the lessee

the exclusive right to develop the lands, and the like. The number of conditions are many, as will appear further on in this chapter, and which it is unnecessary here to further enumerate them.¹

§48. Name applied to instrument does not determine its legal effect.

In determining the scope and legal effect of an instrument giving rights and privileges to mine or take mineral, oil or gas, it is immaterial by what name it is called, whether a "lease," "contract," "grant," or "deed of conveyance," the courts will look to the language used in the instrument, aside from these terms so used, and determine its legal effect. The most commonly used term is the word "lease," and yet many such an instrument has been considered as giving an estate of inheritance, which in fact made it a deed of conveyance.²

§49. Lex loci governs.

The rights of the parties must be determined by the law of the State where the leased premises lie, although it be executed in another State where the lessor and lessee reside.³

§50. License and incorporeal hereditaments.

If one grant in writing a privilege to mine in his lands, he creates an incorporeal hereditament; if he grant by parol the

¹ See *Simpson v. Pittsburgh, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753.

² *Hobart v. Murray*, 54 Mo. App. 249; *Suffern v. Butler*, 21 N. J. Eq. 410, affirming 4 C. E. Gr. (N. J.), 202; *Genet v. Delaware, etc., Co.*, 136 N. Y. 593; 32 N. E. Rep. 1078, reversing 122 N. Y. 505; 25 N. E. Rep. 956; *Sanderson v. Scranton*, 105 Pa. St. 469; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583; *Hope's Appeal*, 29 W. N. C. (Pa.) 365; *Kingsley v. Hillside, etc., Co.*,

144 Pa. St. 613; 23 Atl. Rep. 250; *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853; *Moore v. Miller*, 8 Pa. St. 272; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200; 50 Pac. Rep. 744; *Lambie v. Sloss, etc., Co.*, 118 Ala. 427; 24 So. Rep. 108; *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710; *Shenandoah Land, etc., Co. v. Hise*, 92 W. Va. 238; 28 S. E. Rep. 303.

³ *Genet v. Delaware, etc., Co.*, 35 N. Y. Supp. 147; 13 N. Y. Misc. Rep. 409.

same privilege, he simply constitutes a license. A license is a mere personal privilege, while an incorporeal hereditament is an interest in lands. This distinction is not always observed, and, when not, confusion arises. A license may, however, be reduced to writing, or created in writing by the use of apt words. When privileges are granted by a writing, the writing alone determines the character or legal nature of the privilege granted.⁴

§51. Interest of lessee is a chattel real.

Whatever rights an operator receives, unless he operates under a parol license, he receives by virtue of the written instrument under which he operates, and to that instrument we must look to determine what legal interest he has in the premises. But restricting ourselves to a lease, as such purely, the question arises "What interest has the lessee in the leased premises?" In the case of an agricultural lease, or the lease of a house or building, for a term of years, the interest of the lessee is easily defined by means of the decisions of courts running back many hundreds of years. But in the case of an oil or gas lease, where the length of the term is contingent on the discovery of gas or oil in paying quantities, and on its continuance in such quantities, although limited to a specified number of years, with a right to take and carry away a part of the soil itself, a very different question is presented. The interest of a lessee under such a lease has been termed a chattel real, and not a partnership asset.⁵ "The contract referred to was a lease of the lands for a specified term," said the Supreme Court of Pennsylvania, "and

⁴ See *Nego v. Barber, etc., Co.*, 17 Mo. App. 294; *East Jersey Co. v. Wright*, 32 N. J. Eq. 248.

Oil taken out under a license is the property of the licensee. *Springfield Foundry, etc., Co. v. Cole*, 130 Mo. 1; 31 S. W. Rep. 922; *East Jersey Co. v. Wright, supra*; *Grubb v. Bayard*, 2 Wall Jr. 81; *Clement v. Youngman*, 40 Pa. St. 341; *Algonquin Coal Co. v. Northern, etc., Co.*, 162 Pa. St. 114; 28 Atl. Rep.

402; *Lee v. Bumgardner*, 86 Va. 315; 10 S. E. Rep. 3; *Gillett v. Treganza*, 6 Wis. 343; *Shepherd v. McCalmont Oil Co.*, 38 Hun 37; *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. Rep. 427.

Merely designating the instrument as a lease does not make it so. *Jennings Bros. & Co. v. Beale*, 158 Pa. St. 283; 27 Atl. Rep. 948.

⁵ *Chamberlain v. Dow*, 16 W. N. C. (Pa.) 532.

for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of the writing there can, we think, be no doubt: it conveyed an interest in the land; in this respect it is distinguished from a license." "But although the writing is a lease, it conveyed an interest in the land — a chattel interest, however; the lease was a chattel real, but none the less a chattel."⁶ Such an interest may be sold on execution, the purchaser being regarded as an assignee.⁷ If the lessee mortgage his interest, the mortgage must be executed in accordance with the law relating to a chattel mortgage.⁸

§52. Contract giving interest in real estate.

A contract concerning oil or gas lands may be so drawn as to give an interest in the premises granted, that can only be conveyed or assigned in writing. This was held to be true of a grant of "all the oil and gas in and under" a certain tract of eighty acres of land, with the right to enter thereon at all times for the purpose of drilling and operating for oil or gas, to erect structures and lay pipes, and excepting and reserving a certain part of the oil produced and saved from the premises. If gas were found, certain annual rental for each well while the gas was used off the premises was to be paid, and the grantor was to have free gas for his dwelling houses and for domestic purposes. There were other provisions with respect to forfeiture, if wells were not sunk within a certain time. The conditions between the parties were expressly extended "to their heirs, executors and assigns." The owner of the land had the right to cultivate the soil. The grant was unlimited in time. "The contract is not the form of a lease of the land," said the court, "or any part of it, for years or for life or in perpetuity, with an accompanying right, as an incident of the letting, of taking the oil and gas

⁶ Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608; McElwaine's Appeal (Pa.), 11 Atl. Rep. 453. See Ohio Oil Co. v. Kelley, 9 Ohio C. Ct. Rep. 511; 6 Ohio Cir. Dec. 470; 40 L. Bull. 338; 3 Ohio Dec. 186; Greensburg Fuel Co. v. Irwin, etc., Co., 162 Pa. St. 78; 29 Atl. Rep.

274; First Nat. Bank v. Dow, 41 Hun 13.

⁷ Aderhold v. Oil Well Supply Co., 158 Pa. St. 401; 28 Atl. Rep. 22.

⁸ Devine v. Taylor, 1 Ohio Dec. (N. P.) 153; 12 Ohio C. C. 723; 4 Ohio C. Dec. 248. See Willetts v. Brown, 42 Hun 140.

beneath the surface." In discussing the nature of this contract, the court used the following language: "While for reasons we have sought to state, we do not regard the contract in suit as a grant of land, or as a lease properly so-called, but do regard it as a grant of a right in the nature of an incorporeal hereditament, operative from the time of its execution and during the accomplishment of its purpose as a transfer of an exclusive right to search for, take and appropriate the minerals mentioned in the instrument, under whatever technical common law term it may most properly be classed, it must be held to be a conveyance of an interest in land within the meaning of our statutes." In discussing the nature of the grant, or contract, the court used the following language:

"The grant is not limited to any period of time, though as in the case of a grant of the coal in certain land, it would cease to be operative whenever it should be found that no oil or gas was beneath the soil, or none that could be taken with benefit; whereas a lease of land, properly so-called would continue in force according to its provisions until the end of the term. The contract is in effect a grant of the right to take all the oil and gas that may be found and taken by making wells as prescribed upon the particular tract of land, with accompanying incidental rights to do, as indicated in the contract, upon the surface, those things needed for the enjoyment of the principal right so to take oil and gas. It confers rights not limited as to time, unless it be as to the indefinite period within which oil or gas may be taken advantageously under the conditions prescribed. The right to take all the oil and gas in and under the land is in its nature an exclusive right. It is inconsistent with a right in the grantor or others under him to take any of the oil or gas from beneath the designated land, at least through wells drilled upon that land. The oil and gas in their free and natural state within the land constitute a part of it, though they be fluent and liable to depart to other land, there to be taken into possession through wells made for such purpose. The right to take such minerals from the land constitutes an interest in the land. The instrument under consideration does not create a mere personal privilege to take the minerals from the land. It is an ex-

clusive and assignable interest in land. If with propriety it can be called a license, it must be a license coupled with an interest in land. By its terms the contract is a grant of the minerals in and under the land. If by such general terms all of the specified solid mineral, as coal, in and under the land were granted, it would be a grant of real estate; but because of the fluidity and fugitiveness of petroleum and natural gas the absolute ownership of these mineral substances within the land cannot be acquired without reducing them to actual control; so that a distinction must be and is made between these elusive minerals in and under the ground and the solid minerals in place in the earth. Therefore, a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance as would be a grant of the coal in and under certain land. The owner of land is not by virtue of his proprietorship thereof the absolute owner of the oil and gas in and under it, in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through and under his land (as making of wells) necessary to reduce the minerals to his possession, and by thus acquiring the exclusive control to become the owner of the mineral substances as his personal property, observing due regard in his operations to the like enjoyment of such exclusive right by all other land owners in like circumstances. This exclusive right is his private property. He cannot grant more than he owns; therefore, by granting all the oil and gas in and under his land, he does not grant more than a right to reduce to ownership the oil and gas which may be obtained by operating on the land, whereby substances which at the time of the making of the grant may be in and under lands of other surface properties may come into rightful ownership of the grantee as his personal property. Though, because of the peculiar nature of oil and gas, a corporeal interest in them in place cannot be created, and title to the specific mineral substances can not be acquired without the reduction of them first to personal property, yet the exclusive and assignable right to do this with the accompanying rights necessary to such

accomplishment, constitutes, not a privilege revocable before it has been acted upon, but a subsisting, exclusive, assignable and irrevocable right which accrues upon the execution of the written instrument of conveyance and before any action has been taken thereunder. The right so created is not susceptible of livery of seizin, and is in the nature of an incorporeal hereditament. The contract before us cannot be regarded as a lease of land for three years or less, or as a lease of land ineffectual because of uncertainty or indefiniteness of duration of term; and occupancy thereunder cannot be regarded as a tenancy from year to year; but the interest granted is properly to be considered as an interest in land within the meaning of our statutes."*

§53. Estate does not vest if oil or gas not found.

There is an implied condition in every lease given for oil or gas mining purposes that if oil or gas be not found in such quantities as will justify its operation, within the time stipulated, or within a reasonable time where no time is specified, no estate shall pass by it and vest in the lessee. Contrasting an oil lease with a coal lease, the Supreme Court of Pennsylvania said: "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the

*Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490. See *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259.

Under a statute providing that "land" and "real estate" of a city "include rights and easements of an incorporeal nature," an oil lease owned by a city is real estate. *Kerlin Bros. Co. v. Toledo*, 20 Ohio C. Ct. Rep. 603; 8 Ohio N. P. 62.

An instrument concerning coal lands, setting forth that the owner does "grant, bargain and sell" the coal beneath the surface, and adding words of inheritance, presumptively, a contrary intent not being affirmatively shown, shows that the owner intended to vest in the grantee the entire ownership of the coal in the land described. *Hosack v. Crill (Pa.)*, 53 Atl. Rep. 641.

lessee will be protected in exercising it in accordance with the terms and conditions of his contract." "He [the lessee] could abandon whenever he was satisfied, from the search made, that the further expenditure of time and money upon any given farm, or upon the body of farms covered by his leases, would be fruitless. Whenever he did so abandon a given farm, or the whole body of leased farms to which his contract referred, his rights therein were at an end."¹⁰ In a *nisi prius* court of that State, the following language was used with reference to an oil lease executed as early as 1864: "The contract is peculiar and one of those instruments to which the development of the oil business has given rise. It is not a grant of land, or a present leasehold interest therein. It is not a grant of the mineral, etc., in place or under the land, but the right to search for oil, etc., and the right to enter and occupy for the purpose of such search and no other. If the search is fruitless, it is at the cost of the explorer. When the search is abandoned, the right of entry is gone. But, if the search is successful, then the explorer becomes a tenant for the purpose of operating the land at the rent agreed, and his right of possession exists, not for the purpose of search, but for the purpose of operating the oil or minerals which his search has discovered. Whether the tenancy exists depends, therefore, on whether the oil which is its object is found to exist upon the land."¹¹ If the lessee has the right to

¹⁰ *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; *Steel-smith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259.

¹¹ *McNish v. Stone*, reported in note to 152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232. Ruling followed in *Crawford v. Ritchie*, 43 W. Va. 252; 27 S. E. Rep. 220; *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *May v. Hazlewood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564; *Stage v. Boyer*, 183 Pa. St. 560; 38

Atl. Rep. 1035; *Kenton Gas. etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604; *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381; 18 S. W. Rep. 65; *Muhlenberg v. Henning*, 116 Pa. St. 138; 9 Atl. Rep. 144; *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293; *Miller v. Balfour*, 138 Pa. St. 183; 22 Atl. Rep. 86; *Foster v. Elk Fork, etc., Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560.

abandon the lease after operations begun, and remove all his property from the premises, and he abandon such operations, the lease is at an end.¹²

§54. Vesting title subject to condition precedent.—Diligence.

“While most of the cases¹³ have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum*, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The land owner is entitled to his royalty as promptly as it can be had. The danger of damage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement.”¹⁴

¹² Paine v. Griffiths, 86 Fed. Rep. 452; 58 U. S. App. 38; 30 C. C. A. 182.

An agreement which “granted” an exclusive right to drill for oil and gas in a certain tract, and take them out for twenty years, was held to amount to a sale, conditioned in the first instance on the existence of oil or gas, but made absolute by the

finding of either one. *In re Brunot's Estate*, 29 Pittsb. L. J. (N. S.) 105. See *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259.

¹³ Alluding to the cases previously cited in the opinion.

¹⁴ *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320. Citing *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 593; *Guffy v. Hu-*

§55. Tenancy from year to year or at will.

A gas lease may be so drawn as to create a tenancy from year to year. Such an instance arose in Indiana. A statute of that State provided "that tenancy at will cannot arise or be created without an express contract, and all general tenancies, in which the premises are occupied by consent, either express or implied, of the landlord, shall be deemed tenancies from year to year."¹⁵ An oil and gas lease provided that it should begin the day it was executed, and terminate when gas ceased to be used generally for manufacturing purposes in a certain town, or on failure to pay or tender the rent agreed upon within sixty days after due. As a part of the consideration the lessee agreed to pay one hundred dollars per annum for each gas well drilled and producing gas in paying quantities — payments to begin and to become due as to each well on its completion, and to continue thereafter annually during the term of the lease. If the lessee failed to drill a gas well, he was to pay fifty cents an acre; and if wells were not drilled within five years, then the rent was to be raised to one dollar an acre. If any other gas well was put down on the leased premises other than those stipulated for, then the lessee was to be released from the payment of the rent. As there was no definite time fixed for the running of the lease, it was held to be a tenancy from year to year, within the provision of the statute quoted; and hence was terminable at the end of any year.¹⁶ A sale of all the minerals under a tract of land, with the usual mining rights and privileges, giving a right to enter at any time with workmen and machinery, and mine and carry away coal; giving the right to use so much of the surface as might be necessary for the operations, to erect the necessary

kill, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759, and Rorer Iron Co. v. Trout, 83 Va. 397; 2 S. E. Rep. 713; Conrad v. Moorehead, 89 N. C. 31; Maxwell v. Todd, 112 N. C. 677; 16 S. E. 926; Hawkins v. Pepper, 117 N. C. 407; 23 S. E. 489; Gadbury v. Ohio, etc., Gas Co. (Ind.), 67 N. E. Rep. 259; Lowther Oil Co. v. Miller-Sibley Oil

Co. (W. Va.), 44 S. E. Rep. 433; Monfort v. Lanyon Zinc Co. (Kan.) 72 Pac. Rep. 784.

¹⁵ Burns' Rev. 1901, Sec. 7089.

¹⁶ Diamond Plate Glass Co. v. Echelbarger, 24 Ind. App. 124; 55 N. E. Rep. 233; Diamond Plate Glass Co. v. Curless, 22 Ind. App. 346; 52 N. E. Rep. 782.

buildings, to construct roads, and to use water; the consideration to be a payment quarterly of 15 cents per ton for all iron ore so taken; with the privilege to remove the machinery and fixtures at any time, was held to create a tenancy at will.¹⁷ Where a lessee had the right to surrender the lease, after which all his liabilities under it should cease, it was held that this provision, taken in connection with the granting clause, which stated no time to run, and the *habendum* clause, giving the lessee two years in which to drill for oil, did not create an estate at will.¹⁸ A grant of oil privilege, without limitation as to time, in consideration of one dollar, contained this clause: "In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties; provided, that the second party may prevent such forfeiture from year to year by paying to the first party annually in advance eighteen dollars, at her residence until such well is completed." It was held that by this clause the grant was converted into a lease from year to year, at the option of the lessee, until a well was completed; and that it would then continue so long as oil was produced in paying quantities.¹⁹

§56. Unilateral contract.

In Texas many of the so-called gas leases are regarded as unilateral contracts. Thus, when the consideration for a so-called lease was only one dollar and a promise to develop the premises and deliver to the lessee a stated per cent. of the oil produced; and it was stipulated that the lessee might terminate the lease at any time, and that the sum paid should be the lessor's full compensation, it was held that the contract was unilateral and void; that a sale of the premises before operations began terminated the lease, and that it was not a cloud on the title of such premises.²⁰

¹⁷ *Cowan v. Radford Iron Co.*, 83 Va. 43 S. E. Rep. 101; *Lowther Oil Co. v. Miller-Sibley Oil Co.* (W. Va. 547; 3 S. E. Rep. 120.

¹⁸ *Brown v. Fowler*, 65 Ohio St. Va.). 44 S. E. Rep. 433.

507; 63 N. E. Rep. 76; *Patton v. Axley*, 50 N. C. 440.

²⁰ *Roberts v. McFaddin* (Tex. Civ. App.). 74 S. W. Rep. 105; *Natural Oil, etc., Co. v. Teel* (Tex. Civ.

¹⁹ *Lowther Oil Co. v. Guffey*, (W. Oil, etc., Co. v. Teel (Tex. Civ.

§57. Legal interest of lessee in various leases.— Digest.

Under various heads we have discussed the interest a licensee, lessee or grantee under a written instrument has in the premises described in the instrument giving oil or gas mining privileges. It is safe to say that all the cases cannot be reconciled with respect to the interest the operator has in the premises, and nothing more can be done than to enumerate each particular case, or a number of them; for it will be impractical to examine and state the result of all of them. Cases, however, with respect to licenses will be omitted here, for they have been treated elsewhere. To begin the enumeration. An agreement to lease land for a term of years, giving the exclusive right to bore for and collect all the oil passes a corporeal interest in the land.²¹ A guardian, while he may usually give a lease of his ward's property, cannot give a lease for the purpose of developing the oil in it; for the reason that it is a part of the realty, and such a lease is a part of the estate of the ward.²² A lease only for the purpose of drilling for oil, coal, rock or petroleum given to the lessee, his heirs and assigns, for twenty-five years, in consideration of one-half the oil found, vests in the lessee a corporeal interest in the business, which is the subject of ejectment.²³ A grant to C, his heirs and assigns, of the free and uninterrupted right to go upon a tract of land to prospect, bore and take ore, oil and gas out of the earth, the grantor to receive one-third of all taken out, and reserving the right of tillage, vests in C an incorporeal hereditament in fee.²⁴ A grant of all the iron ores upon and under a tract of land, with the exclusive and full right to mine them, is a conveyance of an incorporeal hereditament passing in fee simple the entire ownership of the

App.), 67 S. W. Rep. 45; 68 S. W. Rep. 979; *Emery v. Ledeque*, 6 Tex. Civ. App. 719; 72 S. W. Rep. 602.

²¹ *Chicago, etc., Co. v. United States Co.*, 57 Pa. St. 83; *Duke v. Hague*, 107 Pa. St. 66.

²² *Stoughton's Appeal*, 88 Pa. St. 198; *Chamberlin v. Dow*, 16 W. N.

C. 532; *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296; 28 S. E. Rep. 922.

²³ *Barker v. Dale*, 3 Pitts. L. J. 190.

²⁴ *Funk v. Haldeman*, 53 Pa. St. 229; *Union Petroleum Co. v. Bliven, etc., Co.*, 72 Pa. St. 173.

ore in the land.²⁵ An exclusive possession of such of the land as is necessary, given for the purpose of searching for, producing, storing and transporting oil, is not a mere license.²⁶ A grant of the "exclusive right and privilege of digging and boring for oil and other minerals," for a term of years is a lease for the production of oil and not a sale of the oil.²⁷ A lease for a term of years, with right to bore for oil and take it, rendering a part to the owner of the land, confers an estate in the nature of an incorporeal hereditament.²⁸ An instrument giving B the right to enter on certain lands and prospect for coal, and if found in sufficient quantities to satisfy him, giving him the privilege to mine and remove it, paying a certain amount per ton, and also giving him the right, at his pleasure, to abandon the agreement, creates only an estate at will.²⁹ An instrument granting and conveying the right to enter on certain lands and take the minerals thereon forever, unless none should be found within a certain named period, is a grant in fee, though called a "lease."³⁰ A right given in the following language is a lease: "The said party, of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid and performed on the part of the said party of the second part, the right to mine and take away coal from the Salem vein," etc. "A right to use a mine necessarily implies a right to possess it; and a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a lease of the thing to be possessed."³¹ A grant of land for an indefinite period, with

²⁵ *Grove v. Hodges*, 55 Pa. St. 504; *Caldwell v. Fulton*, 31 Pa. St. 475.

²⁶ *Kitchen v. Smith*, 101 Pa. St. 452.

²⁷ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 879. See *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934.

²⁸ *Ohio Oil Co. v. Toledo, etc., Co.*, 4 Ohio C. Ct. Rep. 210; 2 Ohio Cir. Dec. 505.

In *Herrington v. Wood*, 6 Ohio C. Ct. Rep. 326, 3 Ohio Cir. Dec. 475,

the usual oil lease was called a license coupled with a conditional grant.

A judgment rendered against a licensee operating an oil well is not a lien on such well. *Meridian National Bank v. McConica*, 8 Ohio C. Ct. Rep. 442; 4 Ohio Cir. Dec. 106.

²⁹ *Knight v. Indiana, etc., Co.*, 47 Ind. 105.

³⁰ *Suffern v. Butler*, 21 N. J. Eq. 410; affirming 4 C. E. Green Ch. (N. J.) 202.

³¹ *Offerman v. Starr*, 2 Pa. St. 394.

leave to take, under specified conditions, all the coal contained in the land, with a provision for a forfeiture on non-compliance by the grantee, is a lease.³² A lease of land in Kansas by a married man, who is the owner, occupying the same with his family as a homestead, giving to the lessee the right to prospect for coal, gas, oil and other minerals at his pleasure, to erect necessary buildings, and to excavate mines and pipe oil and gas, is such an alienation of the homestead as requires the wife's consent, under the constitution of that State.³³ A contract to raise not less than so much ore a year from mines on certain land, for which the contractor is to receive so much per ton, to have tools furnished, and the use of the land and buildings, is a lease.³⁴ An agreement letting lands to be examined for minerals and taking them out at a royalty payable quarterly, the right to continue so long as the grantee deems it advisable to operate, and to be forfeited on cessure of one year to operate, is a lease from year to year.³⁵ A parol agreement that a person may enter on the land of another, dig ore and erect buildings, for a consideration, has been held to be a lease.³⁶ An instrument giving exclusive possession of land for the purpose of searching for, producing, storing and transporting oil, is a lease, establishes the relation of landlord and tenant, and enables the tenant or lessee to recover from the landlord or lessor taxes he has paid under a statute allowing a tenant to recover the amount of taxes he has paid on the leased premises.³⁷ A lease of land "of the exclusive right for the sole and only purpose of mining and excavating for petroleum, rock and carbon oil," "to hold the said premises exclusively for the said purposes only," for a term of years, the lessor reserving the privilege to till the land and remove the timber on it and the use of all other land not necessary for producing oil, and also reserving certain

³² *Gartside v. Outley*, 58 Ill. 210.

³³ *Franklin Co. v. Coal Co.*, 43 Kan. 518; 23 Pac. Rep. 630. See also *Monfort v. Lanyon Zinc Co.* (Kan.), 72 Pac. Rep. 784.

³⁴ *Shaw v. Wallace*, 25 N. J. L. 453.

³⁵ *Patton v. Axley*, 5 Jones L. (N. C.) 440.

³⁶ *Sheets v. Allen*, 89 Pa. St. 47; *Moore v. Miller*, 8 Pa. St. 272, 283. See *Ganter v. Atkinson*, 35 Wis. 48.

³⁷ *Kitchen v. Smith*, 101 Pa. St. 452.

royalties, is a lease in fact and not a license.³⁸ An instrument containing the words "hath granted and leased, and by these presents do grant, lease, and to farm let," and convey "the exclusive right to enter upon all the lands" of the so-called lessor, "and dig and mine upon the same for phosphate rock and other minerals to any extent he may require, and carry away and sell the same for his own use," is a lease operating as a conveyance of the minerals in place, and not a mere license to dig.³⁹ An instrument containing the words "does demise and lease" for mining purposes only, the grantee having the right to erect all necessary buildings and machinery, and being required to provide and keep closed gates through which to enter and pass off the land, giving him possession for ten years, at a fixed rent, is a lease and not a license.⁴⁰ A contract conveying certain land for a term of years, and so long as gas and oil be found in paying quantities, is a lease coupled with a conditional grant, dependent on the production of gas or oil in paying quantities.⁴¹ A contract allowing a person to go to a particular part of the owner's land, giving him exclusive right to the minerals thereon so long as he complies with the terms and conditions of his contract, on payment of a royalty on all minerals mined, is a lease, although it has no determinate period.⁴² A grant of a right to work a stone quarry creates the relation of landlord and tenant.⁴³ An agreement "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which hereafter may be found in, or under" cer-

³⁸ *Duke v. Hague*, 107 Pa. St. 57; *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608; *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; *Gale v. Petroleum Co.*, 6 W. Va. 200.

³⁹ *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907.

⁴⁰ *Kirk v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937, affirming 39 Ill. App. 453.

⁴¹ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. C. Dec. 475.

⁴² *Bucanan v. Cole*, 57 Mo. App. 11; *Springfield, etc., Co. v. Cole*, 130 Mo. 1; *Young v. Ellis*, 91 Va. 297; 21 S. E. Rep. 480.

⁴³ *O'Donnell v. Luskin*, 12 Mont. Co. L. Rep. (Pa.) 109.

As to the right of the lessee to maintain ejectment, see *Kirk v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252.

In New York oil leases and wells held by virtue of them are made personal property by statute. *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584, affirming 58 N. Y. Supp. 526.

tain land, and which reserves the use and possession of the land, except as such use and possession may interfere with the mining operations, is a lease for mining ore, and ceases when it is demonstrated there is no iron ore on the premises.⁴⁴

§58. Sale of oil and gas, and not a lease.

An instrument may be so drawn as to convey an interest in the solid minerals beneath its surface, with the right to mine them. Such an instrument is not to be strictly construed as conveying an interest in the land. Thus where a so-called lease of lands provided that the lessee (so called) should have all the coal beneath the surface for a long term of years, the lessee to take out a minimum number of tons each year until all the available coal was removed, and pay so much a ton, the minimum amount to be paid for whether mined or not, it was held that this was an absolute sale of the coal, conditioned, of course, upon its being removed, and not a lease of the premises for mining purposes.⁴⁵ Similar decisions have been made with reference to oil and gas, the royalty representing the purchase money.⁴⁶

⁴⁴ *Gibben v. Atkinson*, 64 Mich. 651; 31 N. W. Rep. 570.

⁴⁵ *In re Lazarus' Est.*, 145 Pa. St. 1; 23 Atl. Rep. 372; *Hope's Appeal*, 3 Atl. Rep. 23; *In re Hancock's Est.*, 7 Kulp (Pa.), 36; *Hobart v. Murray*, 54 Mo. App. 249; *Lehigh Coal Co. v. Wright*, 7 Kulp (Pa.), 434; 15 Pa. Co. Ct. Rep. 433. (*Contra* *Austin v. Huntsville Coal, etc., Co.*, 72 Mo. 535.) *Raynolds v. Hanna*, 55 Fed. Rep. 783; *Adams v. Ore Knob, etc., Co.*, 7 Fed. Rep. 634; *Williams v. Gibson*, 84 Ala. 228; 4 So. Rep. 350; *Manning v. Frazier*, 96 Ill. 279; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Delaware, etc., Co.*

v. Sanderson, 109 Pa. St. 583; *Lilli-bridge v. Lackawanna Coal Co.*, 147 Pa. St. 293; 22 Atl. Rep. 1035; *Woodside v. Ciceroni*, 93 Fed. Rep. 1; 35 C. C. A. 177; *Hosack v. Crill* (Pa.), 53 Atl. Rep. 640. See *Rowell v. Bodfish* (Me.), 10 Atl. Rep. 448; *Fairchild v. Dunbar*, 128 Pa. St. 485; 18 Atl. Rep. 443.

⁴⁶ *In re Dunat's Est.*, 29 Pittsb. L. J. 105; *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. Rep. 781; 39 L. R. A. 292; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; *Kerlin, etc., Co. v. Toledo*, 20 Ohio C. C. Rep. 603; 8 Ohio N. P. 62; *Lawson v. Kirchner*, 50 W. Va. 344; 40 S. E. Rep. 344; *Hosack v. Crill* (Pa.), 53 Atl. Rep. 641.

§59. Presumption as to ownership of oil or gas in ground.

The presumption is that the owner of the land owns the gas and oil beneath the surface; but this is a presumption that may be rebutted, by showing that either the present owner or a former one had conveyed such oil and gas to another.⁴⁷

§60. Administrator's right to lease or contract.—Presumption.

The right of an administrator of the lessee to lease or contract for searching for oil or gas and the operation of the premises will depend upon whether the estate granted is an estate of inheritance or merely personal property. In the case of solid minerals the minerals may be conveyed separate and apart from the soil in which they rest; and when so conveyed they constitute a separate and distinct estate, vested in the grantee, while the grantor retains the fee of the land, except that of the minerals. The presumption is that the minerals belong to the owner of the land, but that "may be rebutted by evidence, showing a severance of the mines, and a distinct estate and interest in them by grant or reservation."⁴⁸ Minerals so conveyed constitute an inheritance separate and distinct from the surface;⁴⁹ and pass to the heirs and not to the administra-

⁴⁷ *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Grove v. Hodges*, 55 Pa. St. 504 (cases concerning coal and iron ore).

⁴⁸ *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Kincaid v. McGowan*, 88 Ky. 91; 4 S. W. Rep. 802; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Hobart v. Murray*, 54 Mo. App. 249.

⁴⁹ *Wardell v. Watson*, 93 Mo. 107; 5 S. W. Rep. 605; *Hartwell v. Camman*, 2 Stock Eq. (N. J.) 128; *Suffern v. Butler*, 4 C. E. Gr. Ch. (N. J.) 202; affirmed 21 N. J. Eq. 410; *Canfield v. Ford*, 28 Barb. 336; *Marvin v. Brewster, etc., Co.*, 55 N. Y. 538; *Lacustrine, etc., Co. v. Lake Guano, etc., Co.*, 82 N. Y. 476; *First National Bank v. Dow*, 41 Hun 13;

Edwards v. McClurg, 39 Ohio St. 41; *Newark Coal Co. v. Upson*, 40 Ohio St. 17; *Logan v. Washington Co.*, 29 Pa. St. 373; *Caldwell v. Fulton*, 31 Pa. St. 475; *Harlan v. Lehigh, etc., Co.*, 35 Pa. St. 287; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Brown v. Corey*, 43 Pa. St. 495; *Pennsylvania Salt Co. v. Neel*, 54 Pa. St. 9; *Briggs v. Davis*, 81½ Pa. St. 470; *Sanderson v. Scranton*, 105 Pa. St. 469; *Hope's Appeal*, 29 W. N. C. (Pa.) 365; *Montooth v. Gamble*, 123 Pa. St. 240; 16 Atl. Rep. 594; *Fairchild v. Dunbar Furnace Co.*, 128 Pa. St. 485; 18 Atl. Rep. 443; *Lillibridge v. Lackawanna, etc., Co.*, 143 Pa. St. 293; 22 Atl. Rep. 1035;

tor.⁵⁰ Since oil and gas is also a mineral and a part of the soil which holds it, belonging to the owner of such soil, and the subject of a distinct conveyance which gives the grantee (by whatever name he may be called) an interest, it necessarily follows that a grant of the oil and gas beneath the surface of a tract of land will pass to the heir of the grantee and not to his personal representatives; but if the instrument gives the grantee a mere lease and does not give him an interest in the land, it does pass to his administrator.⁵¹

§61. Lease and not a license.

It is often difficult to determine whether an instrument is a lease or a license; and in fact courts differ so much that their decisions on the question cannot be reconciled. The same instrument will be considered a lease by some courts and a license by others. We give several examples that have been construed by the courts. An instrument which grants, demises and lets "all petroleum and gas in or under that certain tract of land . . . and also all the said tract of land for the purpose and for the exclusive right to drill and operate upon said premises for said petroleum and gas," for a limited time, is a lease and not a mere license.⁵² An instrument for a year containing the following clause: "The party of the second part hereby agrees to work said mine in a workmanlike manner, and to pay to the party of the first part royalty from all ores taken

Kingsley v. Hillside, etc., Co., 144 Pa. St. 613; 23 Atl. Rep. 250; *Lazarus' Estate*, 145 Pa. St. 1; 23 Atl. Rep. 372; *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853; *Powell v. Lantzy*, 173 Pa. St. 543; 34 Atl. Rep. 450; *Massot v. Moses*, 3 S. C. 168; *Lee v. Baumgardner*, 86 Va. 315; 10 S. E. Rep. 3.

⁵⁰ *Barksdale v. Parker*, 87 Va. 141; 12 S. E. Rep. 342; *Keeler v. Trueman*, 15 Colo. 143; 25 Pac. Rep. 311; *Carrhart v. Montana, etc., Co.*, 1 Mont. 245.

⁵¹ Where a statute provided that

oil wells and fixtures, and rights held by virtue of any lease, should be deemed personal property for all purposes except taxation, the right to oil is personalty, and does not pass under a deed executed by an executor, the devisee of the lessee having the right to convey all the lands owned by the latter, or in which he has an interest. *Wagner v. Mallory*, 169 N. Y. 501; 62 N. E. Rep. 584; affirming 58 N. Y. Supp. 526.

⁵² *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. J. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62.

out . . . from the mine by the party of the second part"—constitutes it a lease, and not a mere license.⁵³ An agreement giving an exclusive right to mine coal on certain land for a term of years is a lease and not a mere license.⁵⁴ An agreement of an owner of mining lands, allowing a person to enter on them at a particular place and have exclusive possession to dig for minerals thereon, so long as he complies with the conditions of the contract, is a lease and not a license.⁵⁵

§62. License.

As said previously, a license may be created by parol, and whatever right is attempted to be given by parol is a mere license and nothing more. As oil or gas is a mineral, a parol grant to bore for either of them is merely a license. But when the oil has been severed from the ground, and put into a pipe line or a tank, it becomes personal property of the licensee; and so the same is true of gas.⁵⁶ This is the case with respect to hard minerals.⁵⁷ One operating under a parol license is not a tenant of the licensor; nor is he a trespasser.⁵⁸ A mere license to mine is not assignable — it is a mere personal privilege.⁵⁹ One tenant

⁵³ Paul v. Cragnas, 25 Nev. 293; 59 Pac. Rep. 857; 60 Pac. Rep. 983; 47 L. R. A. 540.

⁵⁴ Consolidated Coal Co. v. Peers, 150 Ill. 344; 37 N. E. Rep. 937; Harlan v. Coal Co., 35 Pa. St. 287; Marquis of Bute v. Thompson, 13 M. and W. 487; 14 L. J. Exch. 95; Massott v. Moses, 3 S. C. 168.

⁵⁵ Buchanan v. Cole, 57 Mo. App. 11. See also Young v. Ellis, 91 Va. 297; 21 S. E. Rep. 480; Harlan v. Lehigh Coal Co., 35 Pa. St. 287; Carr v. Benson, L. R. 3 Ch. App. 524; 78 L. T. 696; 16 W. R. 744; Hodgson v. Parkins, 84 Va. 706; 5 S. E. Rep. 710.

⁵⁶ Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490; Wagner v. Mallory, 169 N. Y. 501; 62 N. E. Rep. 584; Parish Fork Oil Co. v.

Bridgewater Gas Co., (W. Va.); 42 S. E. Rep. 655.

⁵⁷ Williams v. Morrison, 32 Fed. Rep. 177; Wheeler v. West, 71 Cal. 126; 11 Pac. Rep. 871; Omaha, etc., Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925.

In Utah a parol lease of a mine is valid, if the lessee has entered and expended labor and money in preparations for mining. Ruffatti v. Societe, etc., 10 Utah 386; 37 Pac. Rep. 501.

⁵⁸ Wheeler v. West, 71 Cal. 126; 11 Pac. Rep. 871; Kamphouse v. Gaffner, 73 Ill. 453; Desloge v. Pearce, 38 Mo. 588.

⁵⁹ Manning v. Frazier, 96 Ill. 279; East Jersey Co. v. Wright, 32 N. J. Eq. 248; Cahoon v. Bayaud, 123 N. Y. 208, 25 N. E. Rep. 376; Dark v. Johnston, 55 Pa. St. 164; Hodgson

in common cannot bind his co-tenant by giving a license.⁶⁰ A subsequent lessee or licensee with knowledge of the first license takes it subject thereto.⁶¹ A husband may give a license to mine on the homestead premises, without the consent of his wife, if the mining does not impair its enjoyment for the uses of a homestead; and even though her consent was necessary, yet it will be inferred, if she had full knowledge of the work done, or expenses incurred, and made no objection.⁶² The owner of land leased it ten years for mining purposes; and subsequently entered into an agreement, before the term had expired, with the lessee by which it was agreed that if the latter would sink a well, plank it, and put in a pump and engine, he should be entitled to dig all the ore on the lessor's land, paying twenty-five cents per ton for it. It was held that this was not a conveyance of the ore, but a mere license to take it, the compensation for the privilege of taking it being rated at twenty-five cents a ton.⁶³ An owner of land bequeathed it to his son, using the following language: "To my son, John, I give and bequeath the farm or plantation he now occupies; to be enjoyed by him, his heirs and assigns forever, with free privilege of taking what coal he wants for his own use or plantation off the home plantation." At the time the will was made, an open mine existed on the home plantation, but none on the farm occupied by the son. It was held that the privilege of taking coal from the home plantation was personal to the son, and did not pass to his successors in title to the premises devised.⁶⁴ An agreement giving "the exclusive use and privilege of digging, hauling off, and working any ore now found, or which may hereafter be found, anywhere" on a certain tract of land, confers a mere license, and

v. Perkins, 84 Va. 706; 5 S. E. 710. A license coupled with an interest is assignable. Funk v. Haldeman, 53 Pa. St. 229.

⁶⁰ Tipping v. Robbins, 64 Wis. 546; 25 N. W. Rep. 713; Tipping v. Robbins, 71 Wis. 507; 37 N. W. Rep. 427.

⁶¹ Harkness v. Burton, 39 Ia. 101.

⁶² Harkness v. Burton, *supra*.

⁶³ Neumoyer v. Andreas, 57 Pa.

St. 446. The court distinguishes this case from the case of Caldwell v. Fulton, 7 Casey 475, and says it closely follows Johnston Iron Co. v. Cambria Iron Co., 8 Casey 241, and Clement v. Younger, 4 Wright (Pa.) 341.

⁶⁴ Youghioghney R. Coal Co. v. Pierce, 153 Pa. St. 74; 25 Atl. Rep. 1026.

creates no easement or estate in the land.⁶⁵ In Pennsylvania a lessee of oil territory who has exclusive privilege of the land for the purpose of searching for oil, producing, storing and transporting it, is more than a mere licensee — he is a tenant.⁶⁶ A conveyance of “the free and uninterrupted use, privilege, and liberty to go on to any part” of a certain described tract of land “for the purpose of prospecting, digging, excavating, and boring and erecting machinery” “necessary for prospecting, experimenting, or searching to find oil,” with a right to the exclusive use of one acre about each well, and a right of way for “himself, lands, and teams, tenants and undertenants, occupiers or possessors of said springs, mines, ores, or coal beds, in common with” the grantor, the consideration being two hundred dollars, and if oil or minerals were found, one-third of the product, and if none be found, the premises to revert to the grantor — creates a license coupled with an interest to work the land for minerals.⁶⁷ Where an owner of an island and a farm granted the right to search for oil on the island, and agreed if the grantee found oil there, to sell him the island for a named sum; and he also gave him the exclusive right to bore wells on the farm, at a certain rent for each well, and that he might remove the machinery if unsuccessful, this was held to be personal license, and not assignable.⁶⁸ A quit claim deed has been held to be a mere license to mine.⁶⁹ A contract of sale and purchase, absolute in form, but requiring payment to be made out of mineral produced from the land, has been held to be a mere option, coupled with a license to work.⁷⁰

⁶⁵ *Barksdale v. Hairston*, 81 Va. 764; *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. 710.

⁶⁶ *Kitchen v. Smith*, 101 Pa. St. 452; *Duke v. Hague*, 107 Pa. St. 57; *Chicago, etc., Co. v. United States, etc., Co.*, 57 Pa. St. 83.

⁶⁷ *Funk v. Haldeman*, 53 Pa. St. 229.

⁶⁸ *Dark v. Johnston*, 55 Pa. St.

164; 9 Morr. Min. Rep. 283; *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Thompson's Appeal*, 101 Pa. St. 225; *Lynch v. Seymour*, 15 Can. Sup. Ct. Rep. 341.

⁶⁹ *Baker v. Clark*, 128 Cal. 181; 60 Pac. Rep. 677.

⁷⁰ *Smith v. Jones*, 21 Utah 270; 60 Pac. Rep. 1104.

§63. License.— Consideration.— Revocation.

A license reduced to writing, if supported by a sufficient consideration, may be irrevocable. Such a license may have the force of an incorporeal hereditament, and take effect as a covenant.⁷¹ Such a license is one coupled with an interest.⁷² Thus where a license was given, in consideration of one hundred dollars already paid, of an exclusive privilege to drill oil wells on certain land for the term of ten years, the licensee to pay ten dollars a year for each well drilled from which he continuously pumped oil, it was held to be an irrevocable license.⁷³

§64. License, revocation.

While a parol license protects the licensee against the charge of trespass so long as it is in force, yet the licensor may revoke it at any time. A conveyance of the property is a revocation of the license,⁷⁴ for the reason that a license is purely personal, and not a part of the land.⁷⁵ But after a license has been fully executed, and is not dependent on continuous acts, it cannot be revoked.⁷⁶ Improvements placed upon the ground will not prevent the revocation of a parol license;⁷⁷ but the licensor must

⁷¹ Boone v. Stover, 66 Mo. 430; Desloge v. Pearce, 38 Mo. 588; Grubb v. Bayard, 2 Wall Jr. 81; Grubb v. Guilford, 4 Watts (Pa.) 223. See Pifer v. Brown, 43 W. Va. 412; 27 S. E. 399 Rep. —; 49 L. R. A. 497; and note in last volume.

⁷² Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608; Funk v. Haldeman, 53 Pa. St. 229.

⁷³ Dark v. Johnston, 55 Pa. St. 164; 93 Am. Dec. 732; 9 Morr. Min. Rep. 283; Grubb v. Bayard, 2 Wall Jr. 81; 11 Fed. Cas. 89. But while the courts treat the privilege given in these cases as licenses, it may well be doubted if the instruments did not give an actual interest in the real estate itself.

⁷⁴ East Jersey Co. v. Wright, 32 N. J. Eq. 248.

⁷⁵ Kamphouse v. Gaffner, 73 Ill. 453; Barry v. Worcester, 143 Mass. 476; 10 N. E. Rep. 186; Desloge v. Pearce, 38 Mo. 588; Barksdale v. Hairston, 81 Va. 764; Geiger v. Green, 4 Gill (Md.) 472; Miser v. O'Shea, 37 Ore. 231; 62 Pac. Rep. 491; Wheeler v. West, 71 Cal. 126; 11 Pac. Rep. 871; Omaha, etc., Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236; Kiddle v. Brown, 20 Ala. 412; 56 Am. Dec. 202.

⁷⁶ Kamphouse v. Gaffner, *supra*; Funk v. Haldeman, 53 Pa. St. 229; Rynd v. Rynd Farm Oil Co., 63 Pa. St. 397; Le Fevre v. Le Fevre, 4 S. and R. 241; Wood v. Leadbitter, 13 M. and W. 838; Dark v. Johnston, 55 Pa. St. 164; 93 Am. Dec. 732.

⁷⁷ Kamphouse v. Gaffner, *supra*.

give the licensee the common law notice of six months — the notice due a tenant at will — or refund to him his expenditure in making the improvements. The object of the six months' notice is to make the improvements available.⁷⁸ The fact that the licensee had not worked a mine, under a license, long enough to reward him for labor and expenditures made — will not prohibit the revocation of his license.⁷⁹ Upon a revocation of the license by notice the licensee may remove his machinery and fixtures.⁸⁰ After revocation, if the licensee take out mineral, he acquires no title to it.⁸¹ A license given to a partnership to take out mineral is revoked by a dissolution of the partnership.⁸²

§65. Merger.

If the lessor convey the fee to the lessee, there is a merger of the estate, and the lease ceases to exist.⁸³ So if the event happens upon which the lease is to cease, there is a merger.⁸⁴ And the same is true where the owner may and does abandon his lease; or, where he may not abandon it, the lessor acquiescing in his abandoning it.⁸⁵ So a deed of conveyance will merge all previous contracts with respect to the land between the vendor and vendee, although in writing.⁸⁶ If a co-lessee purchase the lands of the lessor or his grantee, such co-lessee becomes the ab-

⁷⁸ *Bush v. Sullivan*, 3 Greene (Ia.) 344; 54 Am. Dec. 506; *Beatty v. Gregory*, 17 Ia. 109; 85 Am. Dec. 546; *Harkness v. Burton*, 39 Ia. 101; *Huff v. McCauley*, 53 Pa. St. 206; *Funk v. Haldeman*, 53 Pa. St. 229.

⁷⁹ *Desloge v. Pearce*, *supra*.

⁸⁰ *Desloge v. Pearce*, *supra*.

⁸¹ *Lunsford v. La Motte Lead Co.*, 54 Mo. 426. See *Chynowitch v. Granby, etc., Co.*, 74 Mo. 173.

⁸² *Barksdale v. Hairston*, 81 Va. 764.

⁸³ *Snoddy v. Bolen*, 122 Mo. 479; 24 S. W. Rep. 142; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; *Silva v. Rankin*, 80 Ga. 79; 4

S. E. Rep. 756; *Carroll v. Provincial, etc., Co.*, 26 Can. S. C. 591.

⁸⁴ *State v. Coosaw Mining Co.*, 47 Fed. Rep. 225; *Fairchild v. Dunbar*, 128 Pa. St. 485; 18 Atl. Rep. 443.

⁸⁵ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Bloomfield Coal, etc., Co. v. Tidrick*, 99 Ia. 83; 68 N. W. Rep. 570; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035.

⁸⁶ *Carroll v. Prudence, etc., Co.*, 26 Can. S. C. 591; *Raymond v. Johnson*, 17 Wash. 232; 49 Pac. Rep. 492.

solute owner of the royalty reserved in the lease due from the other lessee, in the proportion the shares held by him bears to that of such co-lessee; but the latter's interest is merged in the fee.⁸⁷ So if two owners of separate properties make a joint lease of both tracts, and the lessee purchase one of the tracts, the lease as to it is merged, and thereafter the lessee pays only one-half the rent he was to have paid the two lessors.⁸⁸

§66. Consideration.

Every lease to be binding must be based upon a consideration; if it is not, it is void.⁸⁹ Thus where the lease did not bind the lessee to begin and prosecute the work with diligence, and the only consideration for it was a part of the oil produced, it was held that it was void for want of mutuality.⁹⁰ The same result was unhesitatingly reached where the lessee had a right at any time to surrender the lease without paying therefor, and was not bound to begin operations, the only consideration being a part of the oil produced.⁹¹ An agreement, however, to pay a dollar an acre rent, or sink a well as the lessee may see fit, the work to begin by a certain time, and the lessor to have a certain part of the oil produced and so much for each gas well developed, is supported by a sufficient consideration.⁹² Where one dollar was paid for a lease, to run two years, with the privilege of twenty-five years on payment of one dollar per acre, it was held there was a sufficient consideration to hold it.⁹³ But where

⁸⁷ *Northwestern, etc., Co. v. Davis*, 9 Ohio C. Ct. Rep. 551; 38 Wkly. L. Bull. 200; 40 Wkly. L. Bull. 251; 6 Ohio Cir. Dec. 529.

⁸⁸ *Higgins v. California, etc., Co.*, 109 Cal. 304; 41 Pac. Rep. 1087.

⁸⁹ *Foster v. Elk Fork, etc., Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320.

⁹⁰ *Foster v. Elk Fork, etc., Co.*, *supra*.

⁹¹ *Eclipse Oil Co. v. South Penn.*

Oil Co., 47 W. Va. 84; 34 S. E. Rep. 923; *Treas. v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933.

⁹² *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220; *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764.

⁹³ *Brown v. Ohio Oil Co.*, 21 Ohio C. C. 117; 11 Ohio C. C. Dec. 810; affirmed 65 Ohio St. 507; 63 N. E. Rep. 76. See also *Monfort v. Lanyon Zinc Co. (Kan.)*, 72 Pac. Rep. 784.

the consideration was nominal, and the lessee led the lessor to believe operations would begin soon, but the lessee had the power to postpone operations on payment of a small sum of money, a court of equity refused to uphold the lease, regarding it merely as an option.⁹⁴ Where the lessee agreed to complete a second well within a certain time after the completion of the first one, but did not agree to complete or even commence such first one, as to the second well it was held there was no consideration for the contract.⁹⁵ An agreement to pay "one dollar per acre each year," where no oil or gas was found within two years, was held too indefinite as an agreement for the further extension of the lease.⁹⁶ Where the lessee was to pay at least one thousand dollars per annum for the use of mining property, it was held not to be error to refuse to charge the jury that owing to the almost entire absence of ore in mining the consideration for the lease had failed.⁹⁷ A lease, on a consideration of one dollar paid, gave the lessee the right to drill for oil and gas, with privileges incidental to the production and removal of the oil and gas produced, for a term of two years, and as long thereafter as they should be found in paying quantities, not exceeding in all twenty-five years. The lessee was to pay a royalty on the production. It then provided that "in case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter." It was held that the lease constituted an entire contract, and that the consideration recited in it supported both the grant of the two years' term and the privilege of extending the time for drilling by paying the stipulated price therefor.⁹⁸ The payment of one dollar, and the erection of valuable machinery on the demised premises, has been held to be a sufficient consideration for a lease.⁹⁹ Where the lease required the lessee to commence a test

⁹⁴ *Eclipse Oil Co. v. South Penn. Oil Co.*, *supra*.

⁹⁵ *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373.

⁹⁶ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

⁹⁷ *Barmford v. Lehigh Zinc and Iron Co.*, 33 Fed. Rep. 677.

⁹⁸ *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604.

⁹⁹ *Herrington v. Wood*, 6 Ohio C. C. Rep. 326; 3 Ohio Cir. Dec. 475.

well on the premises within a certain time, and this requirement was complied with, it was held that there was a sufficient consideration for such lease.¹⁰⁰

“ A person or company purposing to obtain natural gas in large quantity for sale or for manufacturing purposes, finds it desirable to acquire exclusive right to search for the fugitive mineral in a large contiguous area or areas; and though it be not necessary for the proper development of a particular well or to drill wells upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to the wells deemed sufficient for the development of the territory. This accounts for and leads to the insertion in contracts made between such prospectors and the land owners of provisions for exclusive rights, and stipulations forbidding the land owners from drilling wells upon their own land or permitting others to do so; also, along with a provision for an exclusive right, it is common to insert a stipulation for the privilege of delay in drilling wells, upon a specified consideration. Such provisions constitute valuable considerations in these contracts.”¹⁰¹

§67. Option to purchase after development.

A lease provided that “ after the first well is completed, provided it is a paying well, said second party shall have the privilege of buying or leasing the remainder of said Schuler farm, provided he and said Schuler can agree upon the terms within six months.” The court did not consider this was an option in the ordinary sense of the term, nor an offer to the lessee of the remainder of the farm upon defined terms, either of purchase or of lease on royalty, by the acceptance of which he could become either a purchaser or a lessee.¹⁰²

¹⁰⁰ Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335.

¹⁰¹ Simpson v. Pittsburgh, etc., Co., 28 Ind. App. 343; 62 N. E. Rep. 753.

The consideration of an oil lease having a granting clause, a haben-

dum clause, a condition subsequent, and a surrender clause, applies to the whole lease, and to each clause of it. Brown v. Fowler, 65 Ohio St. 507; 63 N. E. Rep. 76.

¹⁰² Childs v. Gillespie, 147 Pa. St. 173; 23 S. E. Rep. 312.

Where the lessee served notice of

§68. Option to extend lease.

A lease, given for five years, required the lessee to drill a well within six months, or in default pay for further delay an annual rental in advance, until a well should be completed. For a failure to complete the well or pay the rental for ten days after the time specified, the lease should be void, only to be renewed by mutual consent; and "no right of action should after such failure accrue to either party on account of the breach of any condition" in the lease. The lease was construed to give the lessee an option to put down a well within six months, and by paying the rental named, the further option for one year.¹⁰³ Where it is optional with the lessee whether he will take the land or not at the end of the year, and the lessor represents to the lessee he would extend the time, and, on the faith of such representations, the lessee goes on and expends moneys, and carries out his part of the contract, the lessor will be bound; and if the property is community property, representations of the lessor's husband to the same effect, followed by the expenditure of money and carrying out the provisions of the lease, will bind the wife.¹⁰⁴

§69. Acceptance of second lease by lessee of first lease.

If a lessee is improperly refused possession by the lessor, and assenting to this refusal he accepts a second lease for the same premises, the act of executing and accepting the second lease amounts to a rescinding of the first one and terminates all rights under it. And an assignee of the first lease, who took it with notice of the execution of the second lease, is bound by the result, even though he expend large sums of money in developing

an intention to exercise his right of purchase and take the premises, and a deed was then prepared but not delivered for three months, because of failure of the lessee to pay the purchase money, it was held that the lessee must pay for the coal he had mined during the three months of delay, for the contract

of purchase was not completed when the option to purchase was exercised. *Flynn v. White Breast Coal Co.*, 72 Ia. 738; 32 N. W. Rep. 471.

¹⁰³ *VanVoorhis v. Oliver*, 22 Pittsb. L. J. (N. S.) 114.

¹⁰⁴ *Presidio Mining Co. v. Bullis*, 68 Tex. 581; 4 S. W. Rep. 860.

the premises before finding out that the lessor is treating such assignee's possession as one under the second lease which he had never seen. A mere rumor that the lease has been assigned is not sufficient to affect the lessor; but a communication made directly to him by either the lessee or assignee of the assignee's understanding of his right of possession, will require him to act and be binding upon him.¹⁰⁵

§70. Extension of time of lease may amount to a new lease.

The extension of the time of a lease may amount to a new lease. Thus where an oil lease was for a term of five years and as much longer as oil or gas was found or produced in paying quantities, the consideration being one-eighth of all the oil produced or found on the premises, delivered free of expense in the tanks or pipe lines to the credit of the lessor; and if gas was found in sufficient quantity to justify marketing it, then the consideration was a royalty of one hundred dollars a year for each well, so long as gas was used from it; and a well was to be completed within nine months, and in case of failure to do so, the lessee was to pay a yearly rental of fifty cents per acre, and it was conditioned that a failure to drill the well on time or pay the rent should render the lease "null and void," and to remain "without any effect between the parties"; and neither possession was taken nor work commenced within the five years, it was held that the lease terminated after the expiration of five years, as no gas or oil was produced within that time, and any extension of time after the expiration of the five years was in effect the execution of a new lease.¹⁰⁶

§71. Options.—Revocation.

Options concerning oil or gas territory in the past have not been uncommon, much to the detriment of the owner of such territory. An option as applied to oil or gas territory, is an

¹⁰⁵ *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951. N. E. Rep. 77; 41 Wkly. L. Bull. 48. See *Biven v. Ohio Oil Co.*, 11 Ohio C. C. Dec. 810; 21 Ohio C. C.

¹⁰⁶ *Northwestern Ohio, etc., Co. v. City of Tiffin*, 59 Ohio St. 420; 54 N. E. Rep. 76. 117; affirmed 65 Ohio St. 507; 63

offer which has not been accepted, containing the terms and conditions on which the person making it will sell or lease his premises, and giving the holder of it, or the person to whom it is made, a specified time within which to elect to accept it. The holder of the option is under no obligation to accept it, but if he elects to do so he must give the person making it notice of that fact. After notice given of an election to accept the offer, it becomes a valid and binding contract. But the acceptance must be made within the time fixed; for after that time has expired the owner of the premises is no longer bound by his offer, and the option is at an end.¹⁰⁷ Thus where the owner of land entered into an agreement providing that A should "have the right to enter upon the premises . . . with men, teams, and tools for the purpose of prospecting and examining for limes and minerals, and to dig, carry away, and test such portions," etc., "as he may think proper," . . . "and if he, after making such examination and test," etc., "shall be of opinion that they are worth working, he shall then have the right to go on and dig, carry away, and cause to be worked such of the substances there found," the expenses to be borne by A; it was held that the instrument conveyed no title to the land to A, but gave him a license or authority to enter upon the lands for the specific purpose of prospecting for minerals, and of extracting the ores, and if he considered them worth working, he had an option he could enforce. However, before he could acquire an interest in the land, he had to declare his election to exercise his option; when he had done that he would be in a position to compel a conveyance. Until he had declared his election, he had a mere license, which was a personal privilege only and not assignable or transmissible. The agreement by its terms was binding on the land owners, "heirs and assigns of the respective parties." The owner sold the land. For twenty years A visited the land and did some prospecting, but nothing more. At the end of ten years the owner sold the land. It was held that A was bound to declare his position towards the owner of the land as soon as it was fairly possible. "Fair

¹⁰⁷ *McMillan v. Philadelphia Co.*, *Barrett v. McAllister*, 33 W. Va. 159 Pa. St. 142; 28 Atl. Rep. 220; 738; 11 S. E. Rep. 220.

dealing," said the court, "required of him to take the requisite steps, under this agreement, within a reasonable time. No time being specified in the instrument, the law affixed to it the obligation of proceeding within what would be deemed a reasonable time." As the owner had a right to revoke the license, and A had failed to declare his position with reference to the land, the court considered the conveyance a revocation of the license.¹⁰⁸ Where the instrument was to run ninety-nine years and was of the "mineral and petroleum interests" in the land, the so-called lessees to pay "one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed admissible to be tested and worked," and the lessees agreed "to commence testing said property within three years' time," it was held that the lessee was under no obligation to commence work unless he deemed it advisable, that there was no consideration for the instrument, and therefore it was void; and that it was a mere option.¹⁰⁹ Where a lease provided if oil or gas were found the lessee should have the refusal for three months of a lease of an adjoining tract, on terms "that may be equal to the best terms offered by any other person or persons therefor," it was held that this option passed with an assignment of the lease, even though the lease was not assignable, the lessor having entered into a new agreement with the assignee, especially providing for a continuance of the covenants of the lease unmodified.¹¹⁰ An option without any consideration for it, may be withdrawn at any time before its acceptance.¹¹¹ A so-called lease, not binding on the lessee to carry out its covenants, but reserving to him the right to defeat it at any time, and relieve himself from the payment of any consideration for it, is invalid to create any estate except a mere optional right of entry, which can be terminated by either party at his will, and which the death of the lessor does terminate.¹¹² A lease pro-

¹⁰⁸ Cahoon v. Bayaud, 123 N. Y. 298; 25 N. E. Rep. 376.

¹⁰⁹ Petroleum Co. v. Coal, etc., Co., 89 Tenn. 381; 18 S. W. Rep. 65; Snodgrass v. South Penn. Oil Co., 47 W. Va. 509; 35 S. E. Rep. 820.

¹¹⁰ Guffey v. Clever, 146 Pa. St. 548; 23 Atl. Rep. 161.

¹¹¹ Snow v. Nelson, 113 Fed. Rep. 353.

¹¹² Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. Rep. 933; Steelsmith v. Gartlan, 45 W. Va.

vided that it should become null and void, and all rights under it should cease and determine, unless a well should be completed on the premises within one month from the date thereof, or unless the lessee should pay at the rate of one hundred dollars monthly, in advance, for each additional month such completion was delayed, from the time mentioned for the completion of the well, until a well was completed. It was held that this was a mere option, revocable at the pleasure of the lessee.¹¹³ Where a lease contained a clause that at the end of the term the lessee might have the right to purchase the leased premises, this was held to give the assignee of the lease the right to make the purchase.¹¹⁴

§72. Options continued.

As a rule time is of the essence of an option, as is well illustrated by an agreement providing that the prospective purchaser should "have the refusal ten days from date"; and it was held that the purchaser must exercise his option within that time by a declaration of an intention to purchase, although it was not necessary to complete the purchase within that time.¹¹⁵ In speaking of options on oil or gas lands, the Supreme Court of the United States used this language: "The fluctuating character and value of this character of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which we today sell for a thousand dollars as its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over had been

27; 29 S. E. Rep. 978; 44 L. R. A. 107.

¹¹³ Glasgow v. Griffith, 22 Pittsb. L. J. (N. S.) 181.

¹¹⁴ Napier v. Darlington, 70 Pa. St. 64.

¹¹⁵ Smith's Appeal, 69 Pa. St. 474. See Flynn v. White Breast Coal Co., 72 Ia. 738; 32 N. W. Rep. 471.

at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them."¹¹⁶ One who purchases land, with knowledge that another holds an option upon it, takes it subject to the right of the person holding such option, and he holds it in trust for him. The person having the option may follow the land and compel such purchaser to execute to him a lease or a deed of conveyance, as the option may provide; or he may, in case of an option to purchase, compel the original owner to pay him what he had agreed to take for the land, and have a decree to sell it in order to satisfy his claim. Of course, both the original owner and purchaser are necessary parties to the suit.¹¹⁷ Where lands and the oil and gas in it were let, demised and granted for the purpose and with the exclusive right to drill and operate for oil and gas for five years, and as much longer as oil and gas should be found in paying quantities, the consideration being one dollar and a promise to pay certain rentals for further delay if default should be made in drilling a test well within a year; and there was a provision in the lease that a failure to drill the well or pay the rent should render it void both as to lessor and lessee, it was held this was more than an option or license, being a lease of the land, oil and gas for the time and purposes specified.¹¹⁸

¹¹⁶ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. See *Johnston v. Standard Mining Co.*, 148 U. S. 360; 13 Sup. Ct. Rep. 585; *Hoyt v. Latham*, 143 U. S. 553; 12 Sup. Ct. Rep. 568; *Hammond v. Hopkins*, 143 U. S. 224; *Felix v. Patrick*, 145 U. S. 317; 12 Sup. Ct. Rep. 862.

¹¹⁷ *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. Rep. 220. See *Weaver v. Burr*, 31 W. Va. 736; 8 S. E. Rep. 743.

¹¹⁸ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 44 N. E. Rep. 1093; 34 L. R. A. 62. See *Monfort v. Lanyon Zinc Co. (Kan.)*, 72 Pac. Rep. 784.

A nominal consideration will not prevent a so-called lease being considered an option. *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 923.

"Contracts unperformed, optional as to one of the parties, are optional

§73. Option to pay rent or drill well.

As a rule a lessee cannot exercise an option concerning the development or working of the premises to avoid the obligation of a lease. This was well illustrated by a case in which the lessee was to pay a monthly rental until a well was completed, and for a failure to complete the well or pay the rental the lease was to be absolutely null and void. It was held that the fact that the lessee had the option to drill the well or not, or pay the rental or not, simply gave him the right merely to elect to drill the well or to pay the rental, and not to elect to do neither and merely suffer a forfeiture of the lease.¹¹⁹ Where the instrument executed by the owner of the land and other persons granted all the oil and gas on the land described, to be paid for by a royalty named, operations to be commenced within two years or the instrument to be void; but a forfeiture might be averted from year to year thereafter by paying one hundred dollars in advance; it was held that the contract could not be regarded as a sale, to be defeated on condition subsequent, for the reason that the real consideration was for the development of the property; and as no definite time was fixed for its development, and it being requisite to an option that there be some time for performance, the owner might rescind the contract, in the absence of any equities owing to any work having been begun by such other persons.¹²⁰

§74. Appurtenances, what will pass as such.

“A conveyance of one acre of land can never be made, by legal construction, to carry another acre by way of incident or appurtenant to the first.”¹²¹ Nor can one tract be so appur-

as to both.” *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107. See *Presidio Mining Co. v. Bellis*, 68 Tex. 581; 4 S. W. Rep. 860.

¹¹⁹ *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624. But see *Monfort v. Lanyon Zinc Co. (Kan.)*, 72 Pac. Rep. 784.

¹²⁰ *National Oil and Pipe Line Co. v. Teel (Tex. Civ. App.)*, 67 S. W. Rep. 545.

¹²¹ *Child v. Starr*, 4 Hill 369; *Trustees of School v. Schroll*, 120 Ill. 509; 12 N. E. Rep. 243; *Ogden v. Jennings*, 62 N. Y. 526.

tenant to another as to carry the latter with it in case it is conveyed.¹²² A deed conveying land and "all appurtenances" conveys incorporeal and not corporeal rights.¹²³ A grant of a right to drill for oil and gas in a certain tract carries with it, as appurtenant thereto, a right of ingress and egress, and space enough to operate, to store oil, and necessary pipe lines to carry away the oil and gas.¹²⁴

§75. Statute of Frauds.

A few decisions may be stated involving the Statute of Frauds without a discussion of any particular rule. Thus a lessor may by parol release the lessee from the payment of a royalty or rent.¹²⁵ A parol agreement between a lessee and a well driller, to put down a well, for an interest in the oil obtained is valid.¹²⁶ So is parol agreement between land owners not to drill within a certain distance of the boundary line between their respective tracts of land;¹²⁷ and likewise a parol agreement to locate a mine and share the expense of locating and developing it;¹²⁸ or that a mine should be worked on the shares.¹²⁹ An oral agreement to deliver a certain share of oil to be produced from land, when put in a tank, is an agreement to give an interest in land, and is within the statute.¹³⁰

¹²² *Humphreys v. McKissock*, 140 U. S. 304; 11 Sup. Ct. Rep. 779; *Grover v. Howard*, 31 Me. 546.

¹²³ *Hofer's Appeal*, 116 Pa. St. 360; 9 Atl. Rep. 441.

¹²⁴ *Dietz v. Mission Transfer Co.*, 95 Cal. 92; 30 Pac. Rep. 380.

A grant of a lower vein of coal carries with it, as appurtenant thereto, the right to pass through the upper vein. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286; 25 Atl. Rep. 597; 18 L. R. A. 702.

A side track, used in operating a mine, passes with a lease of the mine, as appurtenant thereto. *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659.

¹²⁵ *Crawford v. Bellvere, etc.*, Gas Co., 183 Pa. St. 227; 38 Atl. Rep. 595; *Nilson v. Goldstein*, 152 Pa. St. 493; 25 Atl. Rep. 493.

¹²⁶ *Haight v. Conners*, (Pa. St.); 24 Atl. Rep. 302.

¹²⁷ *Ware v. Longmade*, 9 Ohio C. Ct. Rep. 85.

¹²⁸ *Moritz v. Lovelle*, 77 Cal. 10; 18 Pac. Rep. 803.

¹²⁹ *Hudepohl v. Libert, etc., Co.*, 80 Cal. 553; 22 Pac. Rep. 339.

¹³⁰ *Lithgow v. Shook*, 39 Ohio Wkly. L. Bull. 39. See *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

§76. Description of leased premises.

Parol evidence is not admissible to vary a definite description contained in a lease, or to show that it was the intention to cover another tract.¹³¹ "In the description of real estate in a written instrument the land must be so far described that it may be identified without resort to parol evidence. In such cases, if an officer is unable to locate the land without the exercise of an arbitrary discretion, the description is insufficient." In the case from which this quotation is made the lease was of "one tract of land, each twenty feet square of the following real estate, towit: All that part of W. $\frac{1}{2}$, N. E. $\frac{1}{4}$, Sec. 24, town 23 north, range 5 east, which lies south and west of Wild Cat Creek, containing in all thirty-two acres, one of said twenty-foot tracts being eight rods south and fifteen east of northwest corner of the above described tract." It was held that this description was void for insufficiency, even admitting that the word "rods" should be supplied after the word "fifteen"; for it was manifest that every part of the square could not be eight rods south and fifteen rods east of the northwest corner of the whole tract; and the description failed to state what part of it is so situated.¹³² But a lease of a large tract, only a part of it to be operated, which part the lessor is to designate, is not void; and the lessor may sue on the covenants of the lease, although he has not designated the part to be occupied by the lessee because he refused to allow him to do so, if he has been ready to point them out to such lessee, and so avers in his complaint.¹³³ A description in a lease of a tract of land twenty feet square "situated at the southeast corner of the north half of the southwest quarter" of a certain quarter section of land sufficiently describes the tract granted.¹³⁴ The owner of

¹³¹ Duffield v. Hue, 129 Pa. St. 94; 18 Atl. Rep. 566.

¹³² Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 132; 52 N. E. Rep. 168.

¹³³ Indianapolis Natural Gas Co. v. Spaugh, 17 Ind. App. 683; 46 N. E. Rep. 691. See Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. Rep. 35;

Lingeman v. Shirk, 15 Ind. App. 432; 43 N. E. Rep. 33; Cheney v. Cook, 7 Wis. 357; Washburn v. Fletcher, 42 Wis. 152; Roehl v. Haumesser, 114 Ind. 311; 15 N. E. Rep. 345.

¹³⁴ Simpson v. Pittsburgh, etc., Co., 28 Ind. App. 343; 62 N. E. Rep. 753.

three forty-acre and adjoining tracts leased one acre, to be selected by himself; and in the lease it was "agreed on the part of the first part that if oil or gas be obtained by the second party or assigns . . . upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate acres of the balance of said premises on the same terms as above." It was held that the forty-acre tract in which the one acre, after the lease had been executed, had been selected by the lessor, was the forty acres to be operated under the contract.¹³⁵

§77. Right of lessor to use surface.

A lease of a tract of land for oil or gas purposes does not necessarily exclude the lessor from using or cultivating its surface, if he does not interfere with the operations of the lessee. Usually the lessee is given possession of so much of the surface surrounding the well or wells, with ingress and egress, as will enable him to drill and operate them, with a right to storage and ways to lay pipe lines; and the remainder of the surface is reserved for the use of the lessor. Or the lessee may be restricted in his operations to a certain described tract carved out of a larger tract, although the right to take the oil or gas under such larger tract is unqualifiedly given him. An instance of this kind came before the Supreme Court of the United States. An owner of forty acres gave a lease on it "for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas," "excepting reserved therefrom ten acres," for two years, or as long as gas should be found in paying quantities. He was to receive one-eighth of the oil produced, and two hundred dollars per annum for each gas well drilled. The lessor reserved the right to "fully use and enjoy the said premises for the purpose of tillage, except such parts as may be necessary for said mining purposes, and a right of way to and from the place or places of said mining or excavating." In construing the lease, the

¹³⁵ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

court said: "The subject of the grant was not the lands, certainly not the surface. All of that, except the portions actually necessary for operating purposes and the easement of ingress and egress, was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable from the land, or rather the right to take possession of the gas and oil by mining and boring for the same." Of course, the lease gave all the oil and gas under the entire forty acres.¹³⁶ In another case, where the lease specified that no wells were to be drilled within three hundred yards of a certain building on the leased tract, and the lessor had undertaken to lease this three hundred yards to a third party, the court said: "The well which respondent proposes to bore is within this prohibited distance; and the respondents claim that Brown, and they as his lessees, have the right to drill wells within that part of the territory. But the clause in question is neither a reservation nor an exception as to the land, but a limitation as to the privilege granted. It does not, in any way diminish the area of the land leased — that is still the whole tract; but it restricts the operations of the lessees in putting down wells to the portion outside of the prohibited distance. For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any other part of the tract. The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee, and the parties have expressed what otherwise would have been implied by the provision that the lessor is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes."¹³⁷

¹³⁶ *Brown v. Spilman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245; reversing 45 Fed. Rep. 291.

¹³⁷ *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731. See *Funk v. Haldeman*, 53 Pa. St. 229; *Barker v. Dale*, 3 Pittsb. 190.

The lessee has the right to oc-

cupy enough territory to enable him to drill and operate a well or the necessary wells. *Wardell v. Watson*, 93 Mo. 107; 5 S. W. Rep. 605.

The word "surface" used in an oil lease means that portion of the land which is or may be used for agricultural purposes. *Williams v. South Penn. Oil Co. (W. Va.)*, 43 S. E. Rep. 214.

§78. Construction.

In a celebrated oil case it was said with reference to the rule to be applied to the construction of oil leases that "Such leases are construed most strictly against the lessee, and favorable to the lessor."¹³⁸ "When a lease provides the mode, manner, and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent upon the discovery of oil and gas in the search provided for, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five-year limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease."¹³⁹

"Generally, it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due principally, if not entirely, to the nature of the business of mining, and, more specifically, oil mining; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the owner of which is ignorant of their real value for any purpose, and then to hold them indefinitely, should it suit his purpose, neither working them himself nor permitting another to do so. Of course, it may be said, in a general way, that par-

¹³⁸ Citing *Bettman v. Harness*, 42 W. Va. 433; 21 S. E. Rep. 271; 36 L. R. A. 566; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

¹³⁹ *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.

An oil lease will be so construed as to promote development and pre-

vent delay and unproductiveness. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

If the parties act upon interlineations improperly made, the construction they thus put upon the lease will be adopted by the courts. *Barnsdall v. Boley*, 119 Fed. Rep 191.

ties may make any contract which they desire, and, if a lessor should by way of lease make his intention clear to grant the oil and gas rights upon his property for an inadequate consideration, the courts will enforce it. But the lessee, where the instrument presents a semblance of inequality or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims. And, in the case supposed, the mere fact that the instrument would seem to contemplate the equivalent of an absolute gift of valuable rights would at once arouse the suspicion of a chancellor, which, if not dispelled by the clearest proof, would lead to its prompt reforming or setting aside upon the application of the proper parties."¹⁴⁰ A lease must be construed as a whole.¹⁴¹ Thus the consideration of a lease having a granting clause, a *habendum* clause, a condition subsequent, and a surrender clause, applies to the whole lease and to each clause of it.^{*141}

§79. Construction of instrument by parties.

In cases where the parties have put a construction upon an instrument, especially in instances of doubt, that construction will be applied to the instrument by the courts in litigation arising between them over the subject matter of the instrument. Thus where a lease had been treated by both parties to it as a lease at will, in an action by the lessor to rescind, brought sixteen months after its commencement, the court held that the lessee was entitled to recover whatever his advancement exceeded the amount of the royalties on the ore taken out, applying to it the rule with respect to a tenancy at will, although another construction was possible.¹⁴²

¹⁴⁰ Bryan on Petroleum, p. 146, quoted in Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320.

¹⁴¹ Steelsmith v. Gartlan, *supra*.

^{*141} Brown v. Fowler, 65 Ohio St. 507; 63 N. E. Rep. 76.

¹⁴² Oglesbys v. Hughes, 96 Va. 115; 30 S. E. Rep. 439. As to unauthorized changes becoming binding, see Barnsdall v. Boley, 119 Fed. Rep. 191.

§80. Unfilled blanks.—Written and printed clauses.

It is no common occurrence for unfilled blanks to be left in leases, especially where printed forms are used. Occasionally the lease for this reason is so uncertain as to be void. Thus where the operations were to be commenced and prosecuted for two years from the date of the lease, "or thereafter pay to the party of the first part \$ ——— per ———, until work is commenced," the lease was held void for uncertainty by reason of the unfilled blanks. The lease otherwise was a hard one, and the court seized upon the uncertainty to declare it void.¹⁴³ If an oil lease be partly written, and an ambiguity arise out of the inconsistency between the printed and written parts, the latter will control. This is the rule with respect to all instruments that are partly printed and partly written.¹⁴⁴ And it is especially so where the parties have acted in accordance with the written stipulations.¹⁴⁵

§81. Execution of lease.

If a statute provide the manner or form in which a lease shall be executed, it must be followed, or else it will be void. Thus in Ohio a statute provides that the signature of a lessor of a lease exceeding three years must be attested by two subscribing witnesses; and under its provisions it is held that if there be no such attestation, the lease is void.¹⁴⁶

§82. Defective execution or acknowledgment.

A lessee cannot assert an imperfect execution of a lease to escape the payment of rent or royalty; nor the fact that the lessor has not used his correct name, or had used an assumed one.¹⁴⁷ And the fact that the acknowledgment is not such as to bind a married woman making it will not prevent her recover-

¹⁴³ *Eaton v. Wilcox*, 42 Hun 61.

¹⁴⁴ *Fort Orange Oil Co. v. Wichman*, 17 Ohio Cir. Ct. Rep. 57; 9 Ohio Cir. Dec. 650.

¹⁴⁵ *Kokomo Natural Gas Co. v.*

Albright, 18 Ind. App. 151; 47 N. E. Rep. 682.

¹⁴⁶ *Langmade v. Weaver*, 65 Ohio St. 17; 60 N. E. Rep. 992.

¹⁴⁷ *Marmet Co. v. Archibald*, 37 W. Va. 778; 17 S. E. Rep. 299.

ing rentals from the lessee in an action brought by her after the lease had expired by its own limitation.¹⁴⁸ If a seal is required in the execution of a lease by a corporation and one is not used, yet if the lessor, or its successors, accept rent or royalty under the lease it will be estopped to deny its validity.¹⁴⁹

§83. Parol change of written lease.

A parol change of a written lease already executed is valid, especially if it relates to the consideration to be paid for it.¹⁵⁰ If the lease be altered, without the consent of the lessor, by writing in it additional conditions; and the lessor, with knowledge that the changes have been made, make no objection, but insist throughout the term (or even a part of it) on the performance of the contract by the lessee, and accept royalties or rents thereunder, such lessee will waive his right to insist on the invalidity of the lease because of the alteration.¹⁵¹

§84. Acceptance.— Estoppel.

Acceptance of a lease may be shown by an actual oral or written acceptance. Taking it to the proper office, by the lessee, and filing it for recording is such an act as from which an acceptance may be presumed, or from which an inference of acceptance may be drawn. Entering upon the premises and beginning the performance of the agreements or covenants contained in the lease is such an act of acceptance as will estop the lessee from saying that he had not accepted the lease.¹⁵² If a co-lessee has signed the lease on behalf of both not only will such

¹⁴⁸ Kunkle v. People's Gas Co., 165 Pa. St. 133; 30 Atl. Rep. 719; 33 L. R. A. 847.

Reformation of acknowledgment under Pennsylvania Act of May 25, 1879. P. L. 149. Manufacturers', etc., Co. v. Douglass, 130 Pa. St. 283; 18 Atl. Rep. 630.

¹⁴⁹ Bicknell v. Austin, 62 Fed. Rep. 432.

¹⁵⁰ Sargent v. Robertson, 17 Ind. App. 411; 46 N. E. Rep. 925; Wil-

gus v. Whitehead, 89 Pa. St. 131. See Vanderlin v. Hovis, 152 Pa. St. 11; 25 Atl. Rep. 232.

¹⁵¹ Barnsdall v. Boley, 119 Fed. Rep. 191.

¹⁵² Ahrns v. Chartiers Valley Gas Co., 188 Pa. St. 249; 41 Atl. Rep. 739; Grove v. Hodges, 55 Pa. St. 504; Harlan v. Logansport, etc., Co., 133 Ind. 323; 32 N. E. Rep. 930; Indianapolis, etc., Co. v. Kibbey, 135 Ind. 357; 35 N. E. Rep. 392.

co-lessee be estopped to deny he had no authority to sign for his fellow lessee, but the latter, by accepting benefits under the lease ratifies the act of the co-lessee in signing his name to the lease, especially if he knew at the time it was done that his name had been so signed.¹⁵³ Where a lessee denies the execution of a lease, a printed form, such as the lessee generally uses, and which is printed in a book used in an office of public records, cannot be put in evidence; nor can the declarations of an alleged agent, that he signed the deed on behalf of the lessee, be used, unless used to contradict the testimony of such alleged agent.¹⁵⁴

§85. Lessee need not sign lease.— Deed.

A lessee need not sign the lease; by the acceptance of it he is bound by all its provisions. "Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing, binding upon the grantee just as the acceptance by a lessee of a lease in writing signed only by the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee."¹⁵⁵

§86. Separate owners giving joint lease.

There is nothing to prevent the owners of separate and distinct tracts of land giving a joint lease of their separate prem-

¹⁵³ Rice v. Ege, 42 Fed. Rep. 661.

¹⁵⁴ Morris v. Guffey, 188 Pa. St. 534; 41 Atl. Rep. 731.

¹⁵⁵ Schumucker v. Sibert, 18 Kan. 104; Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357; 35 N. E. Rep. 392; Midland R. W. Co. v. Fisher, 125 Ind. 19; 24 N. E. Rep. 756; Ricard v. Sanderson, 41 N. Y. 179; Atlantic Dock, etc., Co. v. Leavitt, 54 N. Y. 35; 13 Am. Rep. 556; Rogers v. Eagle Fire Co., 9 Wend. 611, 618; Spaulding v. Hal-

lenbeck, 35 N. Y. 204; Huff v. Nickerson, 27 Me. 106; Burbank v. Pillsbury, 48 N. H. 475; Goodwin v. Gilbert, 9 Mass. 510; Harrison v. Vreeland, 38 N. J. L. 366; Harlan v. Logansport Natural Gas Co., 133 Ind. 323; 32 N. E. Rep. 930.

A person whose name is not mentioned in the body of the lease is not a party to it, nor bound by it as grantor, although he signs and acknowledges it as his deed. Barnsdall v. Boley, 119 Fed. Rep. 191.

ises on royalty payable to them jointly; and if the lessee purchase the land of one of them, he must continue paying one-half the royalty to the other.¹⁵⁶

§87. Notice to one of several lessees.

A notice to one of several joint lessees is notice to all of them. Thus where a lease or grant was made to four persons jointly, a notice addressed to one of them that the lease or grant had expired, and to keep off the premises, was held a sufficient notice to all of them.¹⁵⁷

§88. Second lease.— Notice.

A person who takes a lease on premises already leased, with notice of the first lease, takes it subject to the rights of the first lessee.¹⁵⁸ Notice to the agent of the second lessee is notice to the lessee, if such agent is employed by such lessee in securing leases for him.¹⁵⁹ Where the law partner of the second lessee, on being consulted by the lessor, drew up the lease, knowing all the facts, for the express purpose of defeating the title of the holders of the prior and unrecorded lease, it was held that such lessee was chargeable with notice of the facts brought to his partner's knowledge during the consultation, and he took his

¹⁵⁶ *Higgins v. California, etc., Co.*, 109 Cal. 304; 41 Pac. Rep. 1087. For an instance of a lease of two separate tracts of this kind, made by husband and wife, that was held their joint lease, see *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662. See also *Northwestern Ohio, etc., Co. v. Ullery*, (Ohio), 67 N. E. Rep. 494, and *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733.

Of an instance of a father and minor son, see *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 38 Atl. Rep. 1021.

¹⁵⁷ *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266; *Baker v. Kellogg*, 29 Ohio St. 663.

¹⁵⁸ *Thompson v. Christie*, 138 Pa. St. 230; 27 W. N. C. 87; 20 Atl. Rep. 934; 11 L. R. A. 236; *Henne v. South Penn. Oil Co.* (W. Va.), 43 S. E. Rep. 147.

In Ohio the lease must be recorded or the lessee have actual possession to put the second lessee or a purchaser on his guard. *Northwestern, etc., Co. v. City of Tiffin*, 59 Ohio St. 420; 54 N. E. Rep. 77.

¹⁵⁹ *South Penn. Oil Co. v. Stone* (W. Va.), 57 S. E. Rep. 374.

lease subject to the first lessee's rights.¹⁶⁰ If the lessee does not record his lease, the drilling of a well in the vicinity of the leased premises, on another farm, in fulfillment of a covenant with his lessor, will not be notice to an innocent second lessee; for such an act is not sufficient to put others on notice of his possession of the leased premises.¹⁶¹ Where a statute required a lessee or licensee to record his oil or gas lease or license, and made its record the only notice that could be available against third persons acquiring an interest in the land adverse to the lessee, unless the latter was in actual possession; it was held that a lease which gave the lessee the sole right for a term of years to drill and operate for oil and gas upon the leased premises, although not witnessed as the statute required to constitute it a legal lease, was still good as a license, and entitled to record as such; and also good in equity as an agreement to make a lease; and the record of it was notice to third persons of all rights of the lessee under it. It was also said that if the instrument was not one entitled to record, then notice of its contents could not be given to third persons by recording it, but actual knowledge of its provisions would be effectual to charge a subsequent lessee with notice of the equities of the grantor therein.¹⁶²

§89. Agent of lessee may take lease after forfeiture.

The agent of a lessee, who has entered on the leased premises as such agent, may take a lease from the owner of such premises after a forfeiture has been made; and if for some reason his principal's lease is void, he may take a lease of the premises after it

¹⁶⁰ *Thompson v. Christie, supra.*

¹⁶¹ *Aye v. Philadelphia Co.*, 193 Pa. St. 457; 44 Atl. Rep. 556.

¹⁶² *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604. In this case it was held that a suit to quiet title would lie in favor of the lessee out of possession, under a statute giving one either in or out of possession such a right.

One who has actually read the record of an instrument not entitled to record is chargeable with notice of the contents of the original. *Walter v. Hartwig*, 106 Ind. 123; 6 N. E. Rep. 5; *Musick v. Barney*, 49 Mo. 458; *Hastings v. Cutler*, 24 N. H. 481; *Gilbert v. Jess*, 31 Wis. 110; *Musgrove v. Bonser*, 5 Ore. 313; 20 Am. Rep. 737.

is fully developed that his principal will not be able to obtain any benefit under his lease.¹⁶³

§90. Exclusive right of licensee of lessee.—Solid mineral—oil.

“ A license to dig and take ore is never exclusive of the licensor, unless expressed in such words as to show that it was the intention of the parties. Where the license simply gives the licensee the right to dig and take ore, the licensor may take ore from the same mine at the same time, and also grant permission to others to exercise the same right.”¹⁶⁴ The words of a license may be such as to exclude the right of the grantor to mine.¹⁶⁵ Thus a license giving the licensee “ full and free liberty ” to work will be sufficient to make the license an exclusive one.¹⁶⁶ “ A license may confer a sale or exclusive right, or simply a right in common. If it simply confers a right to dig and take ore, or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. And when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate in the property or land passed, the licensee acquires no title to the ore until he has severed it. Such a license has been adjudged to confer a privilege similar to a right of common *sans nombre*, to give a right without stint as to quantity, but not exclusive of the grantor. There can be no doubt that the instrument under consideration conferred an exclusive

¹⁶³ Duffield v. Michaels, 97 Fed. Rep. 825.

The lessee of mining property is not the agent of the owner. Wilkins v. Abell, 26 Colo. 462; 58 Pac. Rep. 612.

¹⁶⁴ Silsby v. Trotter, 29 N. J. Eq. 228; Mountjoy's Case, Godb. 18; 1 Amb. 307; 4 Leon. 147; Chetham v. Williamson, 4 East 409; Grubb v. Bayard, 2 Wall Jr. 81; Funk v. Haldeman, 53 Pa. St. 229; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Manganese Co. v.

Trotter, 29 N. J. Eq. 561; Jennings Bros. & Co. v. Beale, 158 Pa. St. 283; 27 Atl. Rep. 948; Massott v. Moses, 3 S. C. 168; Barker v. Dale, 2 Fed. Cas. 810; 3 Pittsb. 190; Woodside v. Ciceroni, 93 Fed. Rep. 1; 35 C. C. A. 177.

¹⁶⁵ Caldwell v. Fulton, 31 Pa. St. 475.

¹⁶⁶ Doe. d. Hanley v. Wood, 2 Barn. and Ald. 724; Sutherland v. Heathcote [1892], Ch. 504; East Jersey Co. v. Wright, 32 N. J. Eq. 248.

right. The licensor has expressed his intention in that respect in plain words.”¹⁶⁷ These are cases of solid minerals, and at first blush one would suppose that the same rules would be applied to gas or oil; such is not the case. Owing to the “fugitive and wandering nature” of oil and gas, if the licensor or lessor could put down a well on the leased premises he might render the right of the licensee or lessee worthless, by drawing off the oil and gas, even after he had expended large sums of money in developing the premises. It necessarily follows that the “grant of well rights is necessarily exclusive.”¹⁶⁸ This rule is well illustrated in a Pennsylvania case. The owner of land leased a certain tract of land, according to a division of the tract into numbered sites, each site situated on a lot numbered respectively on a map; and also sites for three wells south of the railroad track on it; to be designated and mutually agreed upon by him and the lessee, for a term of fifteen years, “with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals on said lot.” The lessee, for oil mining purposes, was restricted to the specified sites; and he had no right of possession for any other purpose at any other place on the tract of land described. It was held that the lessor could not drill wells on the tract of land outside of the designated sites, nor authorize any one else to do so; and if he undertook to do so a court of equity would restrain him; for the reason that the sinking of wells outside of such sites would lessen the production of the wells drilled by the lessee, and the injury would be destructive of his rights and was incapable of an adequate remedy at law.¹⁶⁹

¹⁶⁷ *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Johnston Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; *Jennings v. Beale*, 158 Pa. St. 283; 27 Atl. Rep. 948; *Reynolds vs. Cook*, 83 Va. 817; 3 S. E. Rep. 710; *Bronson v. Lane*, 91 Pa. St. 153.

¹⁶⁸ *Funk v. Haldeman*, 53 Pa. St. 229, 247; *Westmoreland, etc., Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl.

Rep. 724; 29 Am. L. Reg. 93; 5 L. R. A. 731.

¹⁶⁹ *Duffield v. Hue*, 136 Pa. St. 602; 20 Atl. Rep. 526; *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566; *Duffield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4; *Duffield v. Rosenzweig*, 150 Pa. St. 543; 24 Atl. Rep. 705; *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. St. 173; *Heller v. Daley*, 28 Ind. App. 555; 63 N. E. Rep. 490. See *Guffey v. Deeds*, 9 Pa. Co. Rep. 449.

§91. Implied covenant.

By giving a lease the lessor does not covenant that oil or gas is on the premises, or that it can be found on them.¹⁷⁰ There is, however, an implied covenant of right of entry and quiet enjoyment for the purposes of the lease; and it is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession for such purposes.¹⁷¹ But making another lease during the term, by the lessor, whether the first lessee be in actual possession or not, is not a violation of the covenant for quiet enjoyment.¹⁷² As has been said elsewhere, there is not only a covenant on the part of the lessee that he will fully develop the leased premises, but that he will do so with diligence.¹⁷³ There is also an implied covenant on the part of the lessee that he will put down enough wells to protect the leased premises from being drained by wells on adjacent territory.¹⁷⁴ If, however, the lease specifies the number of wells that are to be drilled, there is no implied covenant that more than the number specified are to be drilled, even though more are needed to fully develop the territory, or to protect the premises from wells on adjoining territory.¹⁷⁵ The lessee is under no implied covenant to work the premises at a loss, where the lessor is to receive a part of the product as his compensation; and his judgment whether or not

¹⁷⁰ Kokomo Natural Gas Co. v. Albright, 18 Ind. App. 151; 47 N. E. Rep. 682.

¹⁷¹ Knotts v. McGregor, 47 W. Va. 566; 35 S. E. Rep. 899.

¹⁷² Knotts v. McGregor, *supra*.

In Pennsylvania the implication of a covenant for quiet enjoyment arising from words of grant in a conveyance by virtue of Act of May 28, 1715, Sec. 6, applies only to an estate of inheritance in fee simple, and not to a lease of a mere right to drill oil or gas wells and take the products. Chambers v. Smith, 183 Pa. St. 122; 38 Atl. Rep. 522.

¹⁷³ Huggins v. Daley, 99 Fed. Rep. 806; 48 L. R. A. 320; Steelsmith v.

Gartlan, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. (See the subject of "Forfeiture.") Adams v. Stage, 18 Pa. Super. Ct. Rep. 308; Sharp v. Behr, 117 Fed. Rep. 804; Core v. N. Y., etc., Co. (W. Va.), 43 S. E. Rep. 128.

¹⁷⁴ Harris v. Ohio Oil Co., 57 Ohio St. 629; 50 N. E. Rep. 1129; 48 N. E. Rep. 502; Colgan v. Forest Oil Co., 30 Pittsb. L. J. (N. S.) 68; Kleppner v. Lemon, 176 Pa. St. 502; 35 Atl. Rep. 109; Glasgow v. Charters, 152 Pa. St. 48; 25 Atl. Rep. 232.

¹⁷⁵ Colgan v. Forest City Oil Co., 194 Pa. St. 234; 45 Atl. Rep. 119; 75 Am. St. Rep. 695.

the work can be carried on at a profit, if honest, is entitled to great weight, and should prevail as against the opinion of the lessor, or experts, or the court's, or all of them, to the contrary.¹⁷⁶ Where the lessee was to pay the lessor a royalty if the flow of gas was sufficiently strong to be used off the premises, and one well was drilled which enabled the lessee to pay the royalty; but afterwards the well having got out of order, was abandoned; it was held that the lessee was under no implied covenant to fully develop the premises for gas for the common benefit of the parties to the lease; for the reason that, because of the peculiar nature of natural gas, the effort of the lessee to discharge such an obligation might result in the entire destruction of the leasehold.¹⁷⁷ If the causes for forfeiture of a lease are specified in it, the courts will not infer that there are other causes of forfeiture not declared in it to be such. Ordinarily a breach of an implied covenant will not work a forfeiture of the lease.¹⁷⁸

§92. Covenant running with land.

Covenants that run with the land bind all that hold under the lease, whether as assignee or otherwise. As a rule the intention of the parties to the lease or deed determines the question whether a covenant runs with the land; and to ascertain that intention resort must be had to the words of the covenant, considered, of course, in the light of the circumstances of the transaction and the subject of the grant.¹⁷⁹ A covenant to use due diligence in developing the land is such a covenant.¹⁸⁰ So is a

¹⁷⁶ *Young v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121; 30 Pittsb. L. J. (N. S.) 221; *Stoddard v. Emery*, 128 Pa. St. 436; 24 W. N. C. 566; 18 Atl. Rep. 339.

¹⁷⁷ *Knight v. Mfg's. Natural Gas Co.* (Pa.), 23 Atl. Rep. 164; 29 W. N. C. 261.

In the case of a sale of a mine, where the contract provided for the payment to the vendor of a certain portion of the net profits arising

from operating it, but contained no provision requiring its operation, it was held that there was no implied covenant on the part of the vendee to work the mine. *Hawks v. Taylor*, 70 Ill. App. 255.

¹⁷⁸ *Core v. New York Petroleum Co.* (W. Va.), 43 S. E. Rep. 128.

¹⁷⁹ *Landell v. Hamilton*, 175 Pa. St. 327; 34 Atl. Rep. 663.

¹⁸⁰ *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; 4 Atl. Rep. 218.

covenant for rent or royalty,¹⁸¹ or a certain amount of the oil produced.¹⁸² An agreement that rent should be paid for so much of the surface of the ground as is used for dumping purposes is a covenant running with the land.¹⁸³ So an agreement that the lessor should have a part of the gas free is such a covenant.¹⁸⁴

§93. Personal covenants.

A right in the lessor to receive gas in a certain quantity, or for a certain purpose, may be a mere personal covenant, and one not binding on an assignee of the lease or grantee of the premises. Such was held to be the case with respect to the right to take coal out of a mine. Thus a will provided as follows: "To my second son, John, I give and bequeath the plantation he now occupies, to be enjoyed by him, his heirs and assigns forever, with free privilege of taking what coal he wants for his own use off the home plantation." When the will was made there was an open mine on the "home plantation," but none on the farm John occupied. The court considered the right to take the coal a mere privilege which was personal to John, and one that did not pass to his grantee of the land devised to him.¹⁸⁵ So an agreement in a lease that the lessee may operate an adjoining tract, if the lessor shall so elect, is personal between the lessor and lessee; and if the lessor has not elected to have it operated, a *bona fide* purchaser takes it free from the right of the lessee to operate it. In such an instance the purchaser is only bound to inquire if the lessor has elected to have the land operated according to the terms of the lease.¹⁸⁶ An agreement

¹⁸¹ Fennell v. Guffey, 139 Pa. St. 341; 20 Atl. Rep. 1048; Springer v. Gas Co., 145 Pa. St. 430; 22 Atl. Rep. 986; Fennell v. Guffey, 155 Pa. St. 38; 29 Atl. Rep. 785.

¹⁸² Akin v. Marshall Oil Co. (Pa.), 41 Atl. Rep. 748; Crawford v. Witherbee, 77 Wis. 419; 46 N. W. Rep. 545.

¹⁸³ Schooley v. Butler Mining Co., 9 Kulp (Pa.), 291.

¹⁸⁴ Electric City, etc., Co. v. West

Bridge, etc., Co., 187 Pa. St. 500; 41 Atl. Rep. 458; Indiana, etc., Oil Co. v. Hinton (Ind.), 64 N. E. Rep. 224.

¹⁸⁵ Coal Co. v. Pierce, 153 Pa. St. 74; 25 Atl. Rep. 1026; Indiana, etc., Oil Co. v. Hinton (Ind.), 64 N. E. Rep. 224.

¹⁸⁶ Emerine v. Steel, 8 Ohio C. Ct. Rep. 381; 4 Ohio C. Dec. 92; Norcross v. James, 140 Mass. 188; 2 N. E. Rep. 946.

on the part of the lessee to devote all his time to the development and operation of the land is purely personal; and if the lease be assigned by the lessor the lessee may operate other territory.¹⁸⁷ An agreement at the end of the lease that the lessor would buy all the tools and machinery used on the leased premises is a personal covenant.¹⁸⁸

§94. Assignment of contract giving interest in land.— Incorporeal hereditament.— Lease.— Surrender.

If a contract concerning the right to drill for oil or gas on certain premises, and to operate them if either or both be found, is such as to operate as a grant of an interest in the premises, then it can be assigned or transferred only in writing, and a parol transfer of it is void. "At common law, corporeal hereditaments were demisable without deed or writing, the lease being perfected in the case of a demise for years, by the entry of the lessee, and by livery of seizin in the case of a lease for life; but a deed was always required for the conveyance of incorporeal hereditaments. The provision of the first section of the English Statute of Frauds,¹⁸⁹ that leases not in writing should have the effect of leases at will, left untouched leases of incorporeal hereditaments.¹⁹⁰ At common law, a lease of corporeal hereditaments might be surrendered to him who had the reversion or remainder without deed, writing, or livery; but a deed was indispensable to a surrender of incorporeal hereditaments.¹⁹¹ At common law, a lease for years or for life might be surrendered by parol or by operation of law.¹⁹² Incorporeal hereditaments, the conveyance of which could not be evidenced and accompanied by livery of seizin, but lay only in grant, always at common law could pass only by deed, and could not be surrendered by operation of law.¹⁹³ By section three of the

¹⁸⁷ Findlay v. Carson, 97 Ia. 537; 66 N. W. Rep. 759.

¹⁸⁸ Etowah Mining Co. v. Wills Valley, etc., Co., 121 Ala. 672; 25 So. Rep. 720.

¹⁸⁹ 29 Car. II Chap. 3.

¹⁹⁰ 2 Platt Leases, 1, 2.

¹⁹¹ 2 Platt Leases, 499.

¹⁹² Lynch v. Lynch, 6 Irish L. R. 131.

¹⁹³ Brown St. of F., Sec. 2, 5; Reed St. of F., Sec. 767; Washb. Real Prop., Sec. 552; Lyon v. Reed, 13 M. and W. 285; Wood Landlord

English Statute of Frauds it was provided, that 'no leases . . . shall be assigned, granted or surrendered, unless it be by deed or note in writing signed, . . . or by act and operation of law.' After the enactment of this statute, which introduced no change as to incorporeal hereditaments, they could not be surrendered except by deed.¹⁹⁴ The common law in respect to the surrender of leases must be regarded as in force in this State, except so far as it is modified by our own statutes.¹⁹⁵ Our statutes do not contain, as do those of some of our States, any express, separate provision relating to assignments or surrenders of leases, corresponding to the third section of the English statute.¹⁹⁶ But our statutes contain nothing expressly or by necessary implication forbidding surrender by act and operation of law, and construing our express requirements concerning conveyances as relating to transfer by contract, and as including surrenders in fact, we may hold that such surrenders as properly come within the meaning of the words 'by act and operation of law' as used in the British Statute of Frauds and in similar statutory provisions of sister States, may be upheld in this State. The provisions of the English statute for surrender by act and operation of law was

and Tenant (2d ed.), 1154, and notes.

¹⁹⁴ Lyon v. Reed, 13 M. and W. 285; 2 Platt Leases, 503; Brown St. of F., Sec. 2, 5.

¹⁹⁵ R. S. 1901, Sec. 236.

¹⁹⁶ The court had already quoted a statute which provided that "Conveyances of lands or of any interest therein, shall be by deed in writing, subscribed, sealed and duly acknowledged by the grantor or by his attorney, except *bona fide* leases for a term not exceeding three years." (R. S. Indiana, 1901, Sec. 3335), and it had said that the term "grantor," as used in the statute, embraced "every person by whom any estate or interest in land is created, granted, bargained, sold, conveyed, transferred or assigned." (R.

S. Indiana, 1901, Sec. 3375.) Another statute provided that the word "land" included "lands," "tenements" and "hereditaments." (R.S. Indiana, 1901, Secs. 241, 1309.) While still another dispensed with the use of the words "heirs and assigns" to create in the grantee and estate of inheritance. (R. S. Indiana, 1901, Sec. 1901.) By the Statute of Frauds of that State no action could be brought on any contract for the sale of lands unless the contract or some memorandum or note thereof was in writing and signed by the party to be charged therewith, or by some person authorized to sign it, excepting leases not exceeding the term of three years. (R. S. Indiana, 1901, Sec. 6629.)

but a statutory regulation of a common law method. It seems sufficiently plain that an interest in land lying only in grant or a term, unless it be for three years or less, cannot be surrendered by express contract, that is, cannot be transferred or yielded up by surrender in fact, without a writing sufficient for the conveyance of an interest in land greater than can be created by parol."¹⁹⁷

§95. Lessee liable after assignment on express covenants.

"It is generally established that the lessee, who before his assignment of the lease to a third person is bound by both the express and implied covenants of the lease, continues after the assignment to be liable upon his express covenants therein, as if no assignment had been made, and that the assignee is liable to the lessor upon all the covenants which run with the land, for non-performance thereof while the estate is in him, but is not liable for breach of any covenants which occur before the assignment to him or after his assignment to another, the liability of the lessee after his assignment resting in privity of contract, that of the assignee resting in privity of estate and continuing only while such privity exists, though he remains, after his assignment to another, liable for breach which he committed while he had the estate. If the assignee hold possession under the lease, or have immediate right to the possession, when any rent falls due, he will continue liable therefor, and will not escape such liability by his subsequent assignment, and this is true whether he become assignee by the act of the lessee or of the lessee's assignee or by act of law, as by purchase at a sheriff's or an owner's sale."¹⁹⁸

¹⁹⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490, citing to last proposition *McCall Real Prop.* 95, 96; *Taylor L. and T.*, Sec 509; *Wood L. and T.*, Secs. 488, 494; 1 Washb. *Real Prop.* (5th ed.) 579; *Peter v. Barnes*, 16 Ind. 219; *Ross v. Schneider*, 30 Ind. 423.

¹⁹⁸ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Fennell v.*

v. Guffey, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66; *Indiana Natural Gas and Oil Co. v. Hinton* (Ind.), 64 N. E. Rep. 224.

§96. When work must be begun.

If no time is specified within which the work of development is to be begun, then the law steps in, as we have seen, and requires it to be begun within a reasonable time, and the circumstances of each particular case must determine what would be a reasonable time. For if the premises are surrounded by other oil or gas lands that are being rapidly developed, and thereby in all probability drawing the gas and oil from under the leased premises, the lessee must proceed with greater celerity than if such were not the case; and if the leased premises are only a few acres, so that the chances of losing the oil or gas beneath the surface would be greater than if they were of great or considerable extent, then greater celerity is probably required than in the latter instances.¹⁹⁹ Usually, however, the time within which work is to begin is fixed in the lease, in which case the lessee has the whole time allowed within which to begin the work of development, but no more.²⁰⁰ Thus where thirty days was given within which operations must be begun or the lease be void, work begun upon the premises in good faith upon the afternoon of the thirtieth day was held to be in time.²⁰¹

§97. Diligence in operating leased premises after development.

Every gas or oil lease contains an implied covenant that the lessee will use reasonable diligence in operating the premises after they have been developed. One can readily see that a lessee, after he has developed the premises, may work them in so leisurely a way as to be of little profit to the lessor, and that

¹⁹⁹ *Kleppner v. Lemon*, 29 Pittsb. L. J. (N. S.) 346.

²⁰⁰ *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; *Monfort v. Lanyon Zinc Co. (Kan.)*, 72 Pac. Rep. 784.

²⁰¹ *Henderson v. Ferrell*, 183 Pa. St. 547; 41 W. N. C. 404; 38 Atl. Rep. 1018; *Simon v. Northwestern, etc., Co.*, 12 Ohio C. C. Rep. 170; 5 Ohio Cir. Dec. 456; *Duffield v. Rus-*

sell, 19 Ohio Cir. Ct. Rep. 266; 10 Ohio C. D. 472; *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203; *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839.

Whether hauling lumber on the ground the last day is a commencement of the work is a question for the jury. *Forney v. Ward* (Tex. Cir. App.), 62 S. W. Rep. 108.

the latter may suffer a serious damage by reason of the conduct of the lessee. It will not do to say that the lessee has such an interest in the working of the premises as it is to his advantage to work them diligently; for his interests may be adverse to those of the lessor — as, for instance, he may take leases at a lower rental or royalty on the adjoining premises whereby he can drain the premises first leased. A failure, therefore, to work the premises diligently will subject the lessee to an action for damages. And an express covenant to work the premises diligently may bring about a forfeiture of the lease, if they are not so worked.²⁰² In the case of a coal mine, it cannot be inferred, from an agreement to carry on mining operations in a safe, skilful and workmanlike manner that there is a covenant to work the mine continuously.²⁰³

§98. Agreement as to what constitutes due diligence.

The lessor and lessee may agree concerning what shall constitute due diligence, in which event they will be bound by the agreement, whether the degree of diligence constitute due diligence or not. In that event a purchaser from the lessor, even without notice of the special agreement, but with a knowledge of the existence of the lease, will be bound by such agreement.²⁰⁴

§99. Unprofitable lease.

Where the lessor is to receive a part of the profits, or even a part of the product as a royalty, the lessee is not bound to operate the premises at a loss, and may abandon them.²⁰⁵ And

²⁰² Kock's Appeal, 93 Pa. St. 434; Elk Fork Oil and Gas Co. v. Jennings, 84 Fed. Rep. 839; Kleppner v. Lemon, 176 Pa. St. 502; 35 Atl. Rep. 109; Barnsdall v. Boley, 119 Fed. Rep. 191; Harris v. Ohio Oil Co., 57 Ohio St. 629; 50 N. E. Rep. 1129; Glasgow v. Chartiers Oil Co., 152 Pa. St. 48; 25 Atl. Rep. 232; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655; McNight v. Mfg. Natural

Gas Co., 146 Pa. St. 185; 23 Atl. Rep. 164; Core v. N. Y., etc., Co. (W. Va.), 43 S. E. Rep. 128; Edwards v. Iola Gas Co. (Kan.), 69 Pac. Rep. 350.

²⁰³ McIntyre v. McIntyre Coal Co., 105 N. Y. 264.

²⁰⁴ Bartley v. Phillips, 179 Pa. St. 175; 36 Atl. Rep. 217.

²⁰⁵ Bradford Oil Co. v. Blair, 113 Pa. St. 83; 4 Atl. Rep. 218; Adams v. Stage, 18 Pa. Super. Ct. Rep. 308.

the honest opinion of the lessee, that the lease cannot be operated profitably, is entitled to more weight than the opinion of the lessor, of experts, of the judge who tries the case, or of all combined.²⁰⁶ If no rent has been agreed upon, to be paid the lessor if operations are not carried on, under an agreement giving the lessee (so called) all right, title and interest in the oil, such lessee is liable only for nominal damages.²⁰⁷ If the lease sets forth the number of wells that must be drilled, the lessee is not required to drill more than the number in order to make the lease profitable.²⁰⁸ He is not bound to put down a well that would be unprofitable, unless he has expressly agreed to do so.²⁰⁹

§100. Lessor cannot impair value of lease by drilling wells on his own land.

As a general proposition, a lessor cannot drill wells on his own lands so close to the premises he has demised as to seriously impair the value of the latter, by extracting the oil or gas from them. Not infrequently a protecting territory of a certain width surrounding the leased premises, where it is wholly or in part bounded by the lessor's lands, is provided for in the lease, within which neither the lessor nor the lessee may operate. A rather anomalous case on this question arose in Pennsylvania. In that instance a lease of less than four acres was taken, with "a protection of ten rods on the east side" of the lot "and eight rods on the north side." This "protection," so far as the part in dispute was concerned, made a rectangle on the northeast corner of the lease eighty rods square.

²⁰⁶ *Young v. Forest Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121; 30 Pittsb. L. J. (N. S.), 221; *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 48; 25 Atl. Rep. 232; affirming 23 Pittsb. L. J. (N. S.) 146; *Snodgrass v. South Pa. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820; *Lowther Oil Co. v. Miller-Sibley Oil Co.* (W. Va.), 44 S. E. Rep. 433.

²⁰⁷ *Chamberlain v. Parker*, 40 N. Y. 569.

²⁰⁸ *Colgan v. Forest Oil Co.*, 194 Pa. St. 234; 45 Atl. Rep. 119; 30 Pittsb. L. J. (N. S.) 68; 75 Am. St. Rep. 695; *Stoddard v. Emery*, 128 Pa. St. 436; 24 W. N. C. 566; 18 Atl. Rep. 339.

²⁰⁹ *Adams v. Stage*, 18 Pa. Super. Ct. Rep. 308; *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.

In strict sense, this left a square of eight by ten rods between the east and north "protections"; and in this square the lessee sought to drill a well. This the court held he could not do, and in discussing the question used the following language:

"If the stipulation in the lease, on which the right to the injunction depends, is to be strictly construed according to the literal meaning of the language, the defendant's well cannot be regarded as within the protection for which it provides, and if so, the plaintiffs have no legal or equitable right to the relief asked for in the bill. But the agreement must be construed with reference to the subject matter, and so as to effectuate, if possible, the purpose for which it was intended. The lease was 'for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil' in the tract described therein. The parties probably knew that, if oil was found in the demised premises, a well bored within a short distance would draw off more or less of the oil, and that for the same reason a well on the border or side of the tract would draw part of its supply from the adjoining ground. The object of the agreement was, therefore, twofold: To prevent the lessor or any one under him from mining or boring wells within eight rods of the north and ten rods of the east line of the tract described in the lease and to give the lessees more ground for the supply of any wells they might drill or bore on the demised premises in proximity to these lines.' Is it then a reasonable supposition that the parties intended to leave a gap at the corner where these lines intersect which would render the 'protection' valueless and defeat the purpose for which it was intended? The master and the court below were of the opinion that it was the intention of the parties to secure the same protection to the corner as to the sides of the demised tract, and that the agreement should be so construed as to carry out their intention. This, as it seems to us, is its reasonable interpretation; and, if so, the defendants had no right to construct buildings, machinery, and to put down a well within a few feet of the corner of the plaintiff's leasehold, and pump therefrom, as they did, large quantities of oil. Nor can there be a doubt that the plaintiffs have a sufficient title to enable them to obtain

redress by injunction of the wrong done by the defendants. The trespass of which they complain is of a permanent nature, and, under the facts found by the master, destructive of their leasehold. It is clear, then, that under the equitable powers conferred by the statute, the court below had jurisdiction for its prevention or restraint."²¹⁰

Where the lease provided that no wells should be drilled within three hundred yards of a certain building, and there was a reservation of the surface for tillage; it was held that the land within this three hundred yards could not be leased by the owner to a third party to drill wells upon; for the lessee had a right to draw all the oil from beneath its surface that he could by wells sunk in that portion of the tract, of which the three hundred yards was a part, where he had a right to drill them.²¹¹

§101. Lessee draining premises by operations on adjoining territory.

A lessee must act in good faith in the operation of the leased premises. He cannot under the guise of ownership of the adjoining premises drain the lands he has leased by sinking wells on such premises, under the claim of a right to do so, and not put down a sufficient number of wells on the leased territory as will protect it from the wells operated on such adjoining territory, when the lessor, at least, receives his compensation by a royalty on or a part of the oil produced, or by a rental of so much per producing well. Of course, if the lessor receives a lump sum per annum for the ground, or so much per acre per

²¹⁰ Allison's Appeal, 77 Pa. St. 221.

²¹¹ Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731.

The use of pumps, to pump the gas to a distant city, does not violate the rights of land proprietors whose lands adjoin the leased property, at least so long as the pumps

simply push the gas in the mains to the consumer or the company's reservoir, and not cause the gas to flow from the well in greater quantities than it would if the well were left open and the gas permitted to escape, unobstructed, into the atmosphere. Richmond, etc., Gas Co. v. Enterprise, etc., Gas Co. (Ind. App.), 66 N. E. Rep. 782.

annum, then it is immaterial to him whether his premises are developed or not; and the lessee may conduct operations on the adjoining territory, even though he drain the leased premises entirely of their oil and gas. Where an operator obtained leases of two adjoining farms, and placed a well on one of them, so close to the line between them as to drain both farms alike, and failed to sink a well on the other farm to offset the well he had already drilled on the first farm, it was held that the owner of such other farm was entitled to damages; and in estimating the damages the oil actually extracted will be considered in the same way as where an owner wrongfully mingles and confuses his own goods with another's.²¹² And if the lessee refuse to develop such other farm, within a reasonable time, the court may decree a forfeiture of the lease of it, or of so much of it as remains undeveloped.²¹³

§102. Drilling well near boundary line.

By drilling a well close to the boundary line of his land the owner may not only drain the oil or gas from his own territory but from that of his adjoining neighbor. This is easily perceived in instances of drilling wells on ordinary town lots, which are often only thirty or forty feet wide and three or four times as long. It is quite obvious in such an instance one well may drain the oil or gas from under several or even many lots. And yet, who has the right to say the owner of a lot may not put down a well on it, for fear, or from the fact, he may get the oil or gas, or a part of it, under his neighbor's lot? His neighbor has the power to protect his interests, by sinking a well on his own lot; and if he does not see fit to do so, he has no right to prevent another and adjoining lot owner from developing his own territory. He cannot play, as it were, the "dog in the manger" policy. Of course, the same is true of larger tracts, — tracts of even hundreds of acres. One land owner may not deprive another and adjoining one of the right to drill a well

²¹² Kleppner v. Lemon, 29 Pittsb. 502; 35 Atl. Rep. 109. See Henne L. J. 346. v. South. Penn. Oil Co. (W. Va.),

²¹³ Kleppner v. Lemon, 176 Pa. St. 43 S. E. Rep. 147.

on his own land wherever he wills. If his neighbor put a well within a few feet of his boundary line, then he may put a well immediately opposite and just within the line on his own land, although he must necessarily draw oil or gas from his neighbor's soil. This is his protection.²¹⁴ The adjoining land owner may even encrease the flow of gas on his own premises by shooting his wells, although it will have the effect to draw gas from his neighbor's adjoining territory.²¹⁵ But if a man through mere malice, in order to injure his neighbor's gas well, sink a well on his own land, and it has that effect, then he will be liable to an action for damages brought against him by the injured person.²¹⁶ A statute that prohibits drilling within a certain distance of the boundary line is constitutional.²¹⁷ Land owners may agree that they will not drill within a certain distance of the boundary line between them; and for a violation of the agreement, a court of equity will enjoin the one in fault. The mutual protection is a sufficient consideration to uphold the contract.²¹⁸

§103. Injunction.— Quieting title.

Injunction lies to protect the rights of a lessee in the leased territory. He may enjoin any one sinking a well in them, even the lessor, and is not compelled to resort to an action for

²¹⁴ Kelly v. Ohio Oil Co., 57 Ohio St. 317; 49 N. E. Rep. 399; 39 L. R. A. 765; 63 Am. St. Rep. 721; 9 Ohio C. Ct. Rep. 511; 38 Wkly. L. Bull. 299; 39 Wkly. L. Bull. 54; People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Amer. L. Reg. 93; 5 L. R. A. 731; Hague v. Wheeler, 157 Pa. St. 324; 27 Atl. Rep. 714; 22 L. R. A. 141.

²¹⁵ People's Gas Co. v. Tyner, *supra*.

²¹⁶ Dictum in Hague v. Wheeler, *supra*.

If a land owner have ample remedy otherwise, an injunction will

not lie to protect his interests. Erskine v. Forest Oil Co., 80 Fed. Rep. 583.

²¹⁷ Maple v. John, 42 W. Va. 30; 24 S. E. Rep. 608; 32 L. R. A. 800.

²¹⁸ Ware v. Langmade, 9 Ohio C. Ct. Rep. 85; 6 Ohio C. Dec. 43; 2 Ohio Dec. 116.

Pumping gas after it has reached the gas mains, where the flow from the well is not rendered greater than it would be if the well was left open, is not such a violation of the rights of a land owner whose land adjoins such well, as will entitle him to an injunction or to damages. Richmond, etc., Gas Co. v. Enterprise, etc., Gas Co. (Ind. App.), 66 N. E. Rep. 782.

damages.²¹⁹ A person holding a valid executory lease, executed by the land owner or by several of a number of co-tenants, has such an interest, although inchoate in the land, as will enable him to maintain an injunction to prevent a wrong-doer from committing waste by the extraction of oil and gas; and it makes no difference that he has not yet perfected his own right to explore.²²⁰ A lessee in possession may maintain a suit in equity against persons claiming under leases from the lessor to other persons, and may have their leases declared a cloud upon his title.²²¹ A preliminary injunction will be awarded against a lessor where he has made a re-entry under a claim of forfeiture and the claim is disputed on every ground on which he puts it.²²² The court, in such an instance will not only enjoin the lessor, but it will compel him to restore the premises to the condition he found them in when he re-entered upon them, even to the extent of compelling him to restore gas pipe lines he has severed, until hearing.²²³ But the court should not go too far in the preliminary injunction; it being sufficient, as a rule, to preserve the present condition until final hearing, unless gas or oil in considerable quantities will be lost if further steps be not taken.²²⁴ The owner of the land or the lessee may enjoin a stranger who is threatening to put down an oil or gas well. "An action for damages would have been inadequate, since the damages could not be measured. . . . How much the flow

²¹⁹ *Duffield v. Hue*, 136 Pa. St. 602; 20 Atl. Rep. 526; *Bettman v. Harness*, 42 W. Va. 443; 26 S. E. Rep. 271; 36 L. R. A. 566; *Citizens' Natural Gas Co. v. Shenango, etc.*, Co., 138 Pa. St. 22; 20 Atl. Rep. 947.

²²⁰ *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; 34 S. E. Rep. 933; *Allison's Appeal*, 77 Pa. St. 221; *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Allegheny Oil Co. v. Snyder*, 106 Fed. Rep. 764; 45 C. C. A. 604 (by statute).

²²¹ *Elk Fork Oil and Gas Co. v. Jennings*, 34 Fed. Rep. 839. See

Erskine v. Forest Oil Co., 80 Fed. Rep. 583.

²²² *Poterie Gas Co. v. Poterie*, 153 Pa. St. 10; 25 Atl. Rep. 1107; *Duffield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4.

²²³ *Poterie Gas Co. v. Poterie*, 179 Pa. St. 68; 36 Atl. Rep. 232; *Buskirk v. King*, 72 Fed. Rep. 22. See *Black Lick Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448; 21 Atl. Rep. 432.

²²⁴ *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566.

of appellant's well would have been diminished could not be determined; the damages could not be measured in money."²²⁵

§104. Damages.

A failure to develop the leased premises may render the lessee liable to the lessor to an action for the recovery of damages; and usually the lessee cannot set up as a defense that it was purely optional with him to develop such premises. Thus where a lease required the payment of a royalty and a sum of money, operations to begin and a well to be completed within fixed periods of time, containing a clause that on failure to comply the lessee should pay a fixed sum per annum during such delay, and another clause that a failure to comply with or make the annual payment within the time mentioned the lease should be void; it was held that a failure to both commence operations and to make the payments within the agreed time did not render the lease null and void, but it only became such from the expiration of the time within which the payment was to be made, and therefore the lessee was liable for damages sustained by his breach of the covenants.²²⁶ But where the lease was conditioned to be void unless the lessee should do something in the way of development by putting down a well within a certain time, or pay so much money per month, yet contained no covenant to do either; it was held that such lessee was not liable in damages for a failure to perform the conditions named.²²⁷ A failure to sink a sufficient number of wells to develop the territory will render the lessee liable to an action for damages.²²⁸ Where only a part of the land is developed, the implied covenant to develop it all is no ground of forfeiture, but the lessee is liable for damages for a failure to comply with the covenant.²²⁹

²²⁵ Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357; 35 N. E. Rep. 392. See Thomas v. Marble, etc., Co., 58 Fed. Rep. 485.

²²⁶ Galey v. Kellerman, 123 Pa. St. 491; 23 W. N. C. 139; 16 Atl. Rep. 474; Kleppner v. Lemon, 29 Pittsb. L. J. (N. S.) 346.

²²⁷ Glasgow v. Chartiers Gas Co.,

152 Pa. St. 48; 31 W. N. C. 207; 25 Atl. Rep. 232, distinguishing Ray v. Gas Co., 138 Pa. St. 576; 20 Atl. Rep. 1065.

²²⁸ Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. Rep. 662.

²²⁹ Harris v. Ohio Coal Co., 57 Ohio St. 118; 48 N. E. Rep. 502.

§105. Damages for failure to keep covenant.

Instead of declaring a forfeiture, the lessor may elect to bring an action for a failure to keep or perform the covenant broken; and he may recover either on an express or an implied covenant. For the breach of an implied covenant to reasonably operate a mine, or oil or gas lease he has a cause of action. If there has been a breach of an express covenant in part only he cannot declare a forfeiture, where the forfeiture is for a breach of the entire covenant. His remedy in such an instance is an action for damages.²³⁰ If the lease provide the amount of recovery, that will be the measure of damages; and the lessee cannot insist that the amount of damages is more in amount than the value of the lease.²³¹ Where the lease was to the effect that a well should be put down to a certain depth by a certain time, but no rent was reserved, no term of demise was stated, though a right of entry for condition broken was reserved; and the lessee failed to put down the well, it was held that the lessor's damages were only nominal.²³² But where the royalty reserved was one-eighth of the oil produced, and the lease contained a covenant, "to continue, with due diligence and without delay, to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption for the common benefit of the parties"; it was held that this required the lessee to prosecute the business to an extent, considering the knowledge, skill and appliances available at the time, it could reasonably be done and leave the lessee a profit. In determining the measure of the damages for a failure to work the leased premises, the court laid down the following rule: From the amount of oil the lessor ought to have received, take the amount he actually received, and take the value of this difference at the time it should have been delivered to him. From

²³⁰ *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *Blair v. Peck*, 1 Penny (Pa.), 247; *Janes v. Emery Oil Co.*, 1 Penny (Pa.) 242; *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662; *Sharp v. Behr*, 117 Fed. Rep. 864.

²³¹ *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474.

²³² *Chamberlin v. Parker*, 45 N. Y. 569.

this amount deduct the cost of producing what ought to have been produced at the time under the circumstances with the appliances then known, and add to this remainder interest on it from the time when the oil should have been produced to the time of trial.²³³

§106. Damages for neglect to develop or operate leased premises.

The lessor has a right of action against the lessee for failure to develop the leased premises, as he had contracted to do; and the measure of damages is what the lessor was to receive under the contract,— the royalty, as a rule,— where the lessee leaves it in such condition, in case of a test well, that it cannot be tested, and the failure to test it is not unavoidable, or the lessee left it in a condition that it can be tested and the lessor does not know it.²³⁵ Where a party purchased oil lands, agreeing to bore for oil and within a year complete a well, and if oil were found in paying quantities, to drill other wells, and deliver as royalty to the vendor a certain amount realized from the sale of oil and gas produced from all the wells, it was held that the remedy of the vendor for a failure on the part of the purchaser to keep the agreement, was an action for damages and not by way of forfeiture.²³⁶ In a case in the Federal Court, the following language was used: “ But it is contended by the appellee that the clause providing a forfeit of fifty dollars for failure to bore the well within ninety days provides full compensation for failure to perform the condition. As a matter of fact, the fifty dollars was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It

²³³ Bradford Oil Co. v. Blair, 113 Pa. St. 33; 4 Atl. Rep. 218.

²³⁵ McClay v. Western Pennsylvania Gas Co., 201 Pa. St. 197; 50 Atl. Rep. 978. See Sharp v. Behr, 117 Fed. Rep. 864; Core v. N. Y.,

etc., Co. (W. Va.), 43 S. E. Rep. 128.

²³⁶ Ammons v. South Penn. Oil Co., 47 W. Va. 610; 35 S. E. Rep. 1004.

depends upon a construction of the whole instrument, the intention of the parties, the nature of the act to be performed, and the consequences which would naturally flow from its non-performance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages for failure of performance in contracts, where parties stipulated in the alternative, and are free to those. But where consequences likely to follow non-performance are not measurably by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of fifty dollars is stated to be a forfeiture. It is in the nature of a security for the performance, and cannot be held to be liquidated damages from non-performance."²³⁷

§107. Damages for neglect to operate.— *Res judicata.*

If a lessor bring suit to recover arrears of a portion of the oil due him as royalty, a judgment of recovery will bar his claim in a subsequent suit for damages for the lessee's failure to operate the premises.²³⁸

§108. Damages for taking oil or gas.

If the lessee's premises be invaded, and oil or gas extracted from them by sinking wells or in any other manner, he may recover damages from the wrong doer.²³⁹ If the trespasser acted in good faith, the measure of damages when the suit is by the owner of the land and there is no lease involved, is the value

²³⁷ *Huggins v. Daley*, 99 Fed. Rep. 560; and *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.
606; 40 C. C. A. 12; 48 L. R. A. 320. The court cited *French v. Macale*, 2 Dru. and W. 274; *Dooley v. Watson*, 1 Gray 414; *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep. 178; 61 U. S. App. 576; 32 C. C. A. 560; and *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.
²³⁸ *Hill v. Joy*, 149 Pa. St. 243; 24 Atl. Rep. 293.
²³⁹ *Duffield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4.

of the oil (or gas) as it lay in the earth, when the value of the land has not been lessened by his operations or has been increased by valuable erections placed upon it.²⁴⁰ If other wells be wrongfully sunk on the leased premises, the lessee may recover the difference between the value of the premises to him without the wells and their value to him with such wells.²⁴¹

§109. Boundaries.—Location of wells.

As a general rule the lessee has the right to take all the oil and gas under the leased premises. But usually he is not entitled to the possession of the entire surface of the leased tract; for the lease provides, generally, that his possession shall be limited to a certain portion of the leased tract, though he is entitled to all the oil or gas under the surface of the entire tract, if he can draw it out by means of wells sunk in those portions of the tract designated for his use. A lease of eighty acres, "reserving sixty acres around the buildings on said premises," the boundaries to be designated by the lessor, is not so indefinite as to defeat an action for the rent due under it, the lessor being ready at all times to locate the boundaries.²⁴² The lessor having failed to locate the boundaries, it was held that he had waived his right to declare a forfeiture of the lease on the ground that the lessee had not begun operations within the time designated. Adjoining land owners may agree that they will not drill wells within a certain distance of the boundary lines of their respective tracts; and the promise of the one will be a sufficient consideration for the promise of the other, for the reason that the agreement is for the protection of their respective lands. This agreement will be protected by an injunction.²⁴³ A law prohibiting land owners taking solid minerals within a named distance from their boundary lines is valid, being only a restriction

²⁴⁰ *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360; 49 N. Y. Supp. 180.

²⁴¹ *Duffield v. Rosenzweig*, 144 Pa. St. 520; 23 Atl. Rep. 4.

²⁴² *Indianapolis, etc., Co. v.*

Spaugh, 17 Ind. App. 683; 46 N. E. Rep. 691.

²⁴³ *Ware v. Langmade*, 9 Ohio C. Rep. 85; 6 Ohio Cir. Dec. 43; 2 Ohio Dec. 116.

on the land owners for their common benefit.²⁴⁴ In a suit to settle and adjust boundary lines of a lease and tract of land, all persons having an interest in the controversy should be made parties to the action.²⁴⁵ If an oil lease give the lessor the right to select one acre on which a test well is to be drilled, and he select it, and the lessee drill upon it, such lessor cannot make a second selection and insist that the lessee put down another well.²⁴⁶

§110. Selection of site.

Not infrequently the lessor, or the lessor and lessee jointly, is to select the site for the well. If the lessor is to select it, and the lessee assents to the selection, the former will be bound.²⁴⁷ The same is true where the lessor is to select parts of a large tract leased upon which operations may be carried on, according to the provisions of the lease.²⁴⁸ If the lessor is to make the selection with the lessee of the tract out of a larger tract leased, but he has not done so, he may recover rent for the demised premises, if he allege and prove that he has always been ready to make it, and the neglect of the lessee to join with him in making the selection will not defeat the action.²⁴⁹ If a dispute arise as to the location of the well, whether on the lands or not, the jury must decide the question as one of fact.²⁵⁰

²⁴⁴ *Maple v. John*, 42 W. Va. 30; 24 S. E. Rep. 608; 32 L. R. A. 800.

²⁴⁵ *Steelsmith v. Fisher Oil Co.*, 47 W. Va. 391; 35 S. E. Rep. 15; *Moore v. Jennings*, 47 W. Va. 181; 34 S. E. Rep. 793.

²⁴⁶ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35. See *Meeker v. Browning*, 9 Ohio C. D. 108; 17 Ohio C. C. 548.

²⁴⁷ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

²⁴⁸ *Stahl v. Van Vleck, supra*; *Indianapolis, etc., Gas Co. v. Spaugh*, 17 Ind. App. 683; 46 N. E. Rep. 691; *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 132; 52 N. E. Rep. 168.

²⁴⁹ *Indianapolis, etc., Gas Co. v.*

Spaugh, supra. See *Balfour v. Russell*, 167 Pa. St. 287; 31 Atl. Rep. 570; *Duffield v. Hue*, 136 Pa. St. 602; 20 Atl. Rep. 526.

²⁵⁰ *Hamilton v. Pittock*, 158 Pa. St. 457; 27 Atl. Rep. 1079.

A lessee agreed, in consideration that the lessor relinquish all money stipulated for, for the location of additional wells, he would drill additional wells within a time stated. This was held to be an executed release of the location moneys under the former contract, and not merely a conditional one, which remained executory until the new wells were drilled within the time limited. *Meeker v. Browning*, 9 Ohio C. D. 108; 17 Ohio C. C. Dec. 548.

§111. Number of wells.

If the number of wells to be drilled are specified in the lease, there is no room for judicial interpretation of the duty of the lessee in that respect. If the number of producing wells are named, then that number must be drilled, unless it be clearly shown that the number fixed cannot be obtained on the premises, by showing that some of those drilled were dry wells, and that to drill others would not be a benefit to the lessor. If the number of wells is not specified, then a number sufficient to develop the premises must be drilled;²⁵¹ but the court will not undertake to direct how the lessee shall work the premises, or how many wells shall be sunk; and the lessor cannot claim a forfeiture simply because the lessee is not sufficiently active in developing the property.²⁵² If the lessee has agreed to sink a certain number of wells, he cannot, after sinking a part of the number, successfully claim that it would be useless to sink the remainder, on the ground that the sinking of them would probably reduce the flow of the oil or gas in the wells already sunk, and his profits thereby be reduced and the wells probably rendered valueless.²⁵³ A lease of fifty-three acres in 1892 provided that as many wells should be drilled "as may be reasonably necessary to secure the oil for the common advantage of both the lessor and lessee." Between 1892 and 1896 the lessee drilled four wells on the west side of the leased premises, which were paying wells, and one on the east, which did not pay. The distance from the eastern well to the western well was from one thousand to twelve hundred feet. Eight hundred feet on the north and east of the leased premises wells had been drilled

²⁵¹ *Kleppner v. Lemon*, 176 Pa. St. 502; 38 W. N. C. 388; 35 Atl. Rep. 109; 27 Pittsb. Leg. J. (N. S.) 21; *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555; *Kleppner v. Lemon*, 29 Pittsb. L. J. (N. S.) 346; *Gadbury v. Ohio, etc., Co.* (Ind.), 67 N. E. Rep. 259.

²⁵² *Baldwin v. Ohio Oil Co.*, 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50;

Ohio Oil Co. v. Kelley, 9 Ohio C. C. Rep. 511; 6 Ohio Cir. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186. See Pennsylvania case.

²⁵³ *Young v. Equitable Gas Co.*, 5 Pa. Super. Ct. Rep. 232; 28 Pittsb. L. J. (N. S.) 75; 41 W. N. C. 24; *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739.

which were producing in paying quantities. There was proof that a well would draw oil from the sand a distance of five hundred feet. An action was brought to have the lease declared forfeited, on the ground that the lessee refused to drill another well on the eastern side of the premises. The court required the lessee to file with it a stipulation to commence a well on the eastern portion of the premises within twenty days, or have the lease declared forfeited.²⁵⁴ But the the case on appeal was reversed, on the ground that the lessee cannot be compelled, under an implied covenant to develop the premises, to put down a well on the other half, without clearly showing that he is not acting in good faith on his business judgment, but is acting fraudulently, with the intent to obtain a dishonest advantage.²⁵⁵ Where the agreement was for two test wells, and the first one drilled demonstrated that the premises were unproductive, it was held that the lessee was not bound to drill the second well or pay the cash rental provided for in the lease; for as the lands were unproductive, there was nothing in the contract to compel him to drill a second well or pay the rent.²⁵⁶ If the lessee does not drill the requisite number of wells, so as to fully develop the land, where the number of wells is not designated in the lease, the lessor has his action against him for damages.²⁵⁷ But if the lease provides the number of wells that shall be drilled, there is no implication that more than the number specified shall be drilled where it should turn out that not enough was provided for to develop the entire premises.²⁵⁸ In a Pennsylvania case the following language was used with reference to the number of wells that must be drilled: "It is an implied condition of every lease of land for the production of oil there-

²⁵⁴ *Young v. Vandergrift*, 30 Pittsb. Leg. J. (N. S.) 39; *Colgan v. Forest Oil Co.*, 30 Pittsb. Leg. J. (N. S.) 68 (almost identical with preceding case); *Kleppner v. Lemon*, *supra*; *Ohio Oil Co. v. Harris*, 1 Ohio N. P. 132; 1 Ohio Dec. 157.

²⁵⁵ *Colgan v. Forest Oil Co.*, 194 Pa. St. 243; 75 Am. St. Rep. 695; 30 Pittsb. Leg. J. 221; 45 Atl. Rep.

119; reversing 30 Pittsb. Leg. (N. S.) 213.

²⁵⁶ *Kenton Gas, etc., Co. v. Orwick*, 21 Ohio Cir. Ct. Rep. 274; 11 Ohio C. D. 786. See Sec. 112.

²⁵⁷ *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662.

²⁵⁸ *Stoddard v. Emery*, 128 Pa. St. 436; 18 Atl. Rep. 339; 24 W. N. C. 566; *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502.

from that when the existence of oil in paying quantities is made apparent the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operation on adjoining lands; and to the well known fact that a well will drain a territory of much larger extent when the sand-rock in which the oil or gas is found is of coarse and loose texture than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interests of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract.”²⁶⁰

§112. Number of wells.—Protecting lines.

Elsewhere has been discussed the number of wells the lessee is required to drill.²⁶¹ Of course, if the number is specified, that determines the rights of the parties in this connection.²⁶² But if the number is not specified, then the lessee must drill and operate enough as is ordinarily required for the production of the oil contained in such lands, and afford ordinary protection to the lines.²⁶³ If a single well demonstrates the fact that there is no oil, in case of an oil lease, or no gas, in case of a gas lease, “the contract is at an end as soon as such first well is abandoned as unsuccessful.”²⁶⁴

²⁶⁰ Kleppner v. Lemon, *supra*.

Neglect to use diligence and good faith in the development of the leased premises gives a cause of action to the lessor. Kleppner v. Lemon, 29 Pittsb. L. J. (N. S.) 346; affirmed 198 Pa. St. 430; 48 Atl. Rep. 483; Gadbury v. Ohio, etc., Gas Co. (Ind.), 67 N. E. Rep. 259.

²⁶¹ See Index.

²⁶² Colgan v. Forest Oil Co., 194 Pa. St. 234; 45 Atl. Rep. 119; 30 Pittsb. L. J. (N. S.) 213; 75 Am. St. Rep. 695. See Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335;

and Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655.

²⁶³ Harris v. Ohio Oil Co., 57 Ohio St. 118; 48 N. E. Rep. 502; Kleppner v. Lemon, 176 Pa. St. 502; 35 Atl. Rep. 109; Ohio Oil Co. v. Kelly, 9 Ohio C. Ct. Rep. 511; 6 Ohio Cir. Ct. Dec. 470; 40 Wkly. L. Bull. 338; 3 Ohio Dec. 186.

²⁶⁴ Venture Oil Co. v. Fretts, 152 Pa. St. 451; 25 Atl. Rep. 732; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107.

§113. Test Wells.—Excuse for not drilling.

The name "test well" is practically its own definition, or at least suggests its meaning. It is a well put down on the leased premises to determine whether or not oil or gas exists thereon, and usually whether it exists in paying quantities.²⁶⁵ Not infrequently a lease provides that a test well shall be drilled within a certain length of time after it is granted; and when such requirement is inserted it must be complied with, or the lessee will forfeit his right to operate on the premises. In leases for mining solid minerals it is permissible to show as a defense in an action to recover damages for not opening a mine, that there is no mineral beneath the surface, and the lessee may avail himself of that defense and show that such is the fact, he having the burden to show there is no mineral.²⁶⁶ But in the case of a gas or oil lease a defense that there is no gas or oil beneath the surface cannot be shown in any other way than by sinking a well, unless, of course, the plaintiff admits that such is the case, thereby waiving his right to insist upon the well as a test. It cannot be shown that the adjacent territory, or even the entire adjacent surrounding territory has been drilled for gas or oil, in the most thorough manner and none found. In a Pennsylvania case the following language was used:

"The averment in the affidavit of defense that it had been 'ascertained by methods practiced and approved by men skilled in the business, that neither carbon oil nor gas existed in the land leased,' and the view, based thereon, urged with so much force by the distinguished counsel, that it must now be accepted as a demonstration of science that putting down a well on land shown by exploration of neighboring territory to be dry, is a useless expense and damage, and that parties in contracting on the subject must be considered to have had this fact in mind, would be a strong argument to the jury, if the case was one for them, that the plaintiff had suffered no actual dam-

²⁶⁵ *Petroleum Co. v. Coal, etc.*, 89 Tenn. 381; 18 S. W. Rep. 65.

²⁶⁶ *Cook v. Andrews*, 36 Ohio St. 174.

In *Bell v. Truit*, 9 Bush. 257, it

was held that the lessee is not liable unless there was a reasonable probability that the lessor would be benefited by drilling the well.

ages by the defendant's default. But the conclusive answer in the present case is that the parties have clearly stipulated for the mode in which the trial shall be made, and it is to be by a well on this land. There is no room for science, any more than there is for a jury, to say that it will be of no use to do it; the parties have explicitly agreed on the exact thing to be done, and the exact amount to be paid for failure to do it. The scientific nature of mining in the present day, and the certainty of scientific conclusions from exploration of neighboring territory, may be fully recognized and admitted, but nevertheless, hopeful parties may desire an actual test, and if we are to take notice as counsel suggest, of facts in the history of oil mining we know that some of the most extraordinary and profitable productions have been the result of 'wild-catting' in unpromising fields. But it is enough for us that the parties have contracted for one thing to be done and the damages for not doing it. Under such circumstances it is never open to the covenantor to say that the thing would be of no value to the covenantee if it were done."²⁶⁷

Where the agreement was that a well should be completed within a year, and if not, an annual rental paid; if the rental was not paid, the lease to be null and void; and a second well to be completed within two years, and on failure to drill it, a certain sum to be paid or the lease forfeited, it was held to be no defense, in an action to recover their several sums that there was no oil or gas on the leased premise, and for that reason the lease became void and of no effect. The basis for the decision was that the lessor and lessee had fixed upon a test, which was the drilling of two wells; and that no other could be substituted by the lessee without the lessor's consent. It was admitted, however, that the lease could have been so drawn as to admit the defense attempted to be set up by the lessee, namely, by showing otherwise than by test wells that there was no oil or gas in the leased premises.²⁶⁸ If the lease provides for a test

²⁶⁷ *Cochran v. Pew*, 159 Pa. St. 184; 23 Atl. Rep. 219. See *Springer v. Citizens' National Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986.

²⁶⁸ *Gibson v. Oliver*, 158 Pa. St. 277; 27 Atl. Rep. 961; *Johnston, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151.

well, and one is drilled which proves to be a dry well, yet the lessee is bound to bore other wells until he has fully developed the territory.²⁶⁹ If two wells were to be put down by a certain time, the putting down one well, which proved to be a dry well, will not relieve the lessee from the payment of rent, when two wells were to be put down by a certain time or rent to be paid.²⁷⁰ If there be several tracts of land leased, with a royalty for each well, each tract will be treated as a separate tract, and a well must be put down for each of them or rent be paid.²⁷¹ If the lease bind the lessee to test the land within three years, and to work it within a reasonable time, both provisions are conditions on which the lease depends.²⁷² The test well cannot be put down on an adjoining premises, especially if some distance from the line of the leased territory; but it must be put down on the premises leased.²⁷³ An instrument conveyed the oil and gas under forty acres of land, with the right to enter and drill and operate for oil or gas, and maintain all structures and lay all pipes necessary for its production and transportation, and leasing one acre for a test well, with a provision that the lessee should commence operations within thirty days, and complete a well in thirty days after drilling was commenced, and if he failed to do so, he should pay annually a specified price "per acre" until the well was completed; it was held that if no well was completed, the lessee must pay the price fixed "per acre" for forty acres, instead of only one acre.²⁷⁴

§114. Test well, when need not be drilled.

Notwithstanding from what has been said concerning the duty to drill a "test well," it has been held that the circum-

²⁶⁹ *Aye v. Philadelphia Co.*, 193 Pa. St. 451; 44 Atl. Rep. 555.

²⁷⁰ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739.

²⁷¹ *Johnston, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151.

²⁷² *Petroleum v. Coal, etc., Co.*, 89 Tenn. 181; 18 S. W. Rep. 65.

²⁷³ *Carnegie Natural Gas Co. v. Philadelphia Co.*, 168 Pa. St. 317; 27 Atl. Rep. 951.

²⁷⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234.

As to time to return and make further developments, under peculiar circumstances, see *Henne v. South Penn. Oil Co.*, 52 W. Va. —; 43 S. E. Rep. 147.

stances may be such as to excuse the drilling of such a well. Thus, several owners of leases divided them. Several of these owners, who became defendants in a suit, gave the other owners, who became the plaintiffs, an agreement binding themselves to pay one thousand dollars if the oil wells on the premises transferred to them should be unproductive; and an unproductive well was defined as one in which oil was not produced in paying quantities. Without drilling any well, the plaintiffs sued the defendants on the contract, alleging that the territory was unproductive; and to prove that assertion, offered evidence that the wells drilled through the stratum in which oil, when found in that county (and it seldom was found), cost about three thousand dollars, and even then only a trace of oil had been discovered. It was held that this was sufficient to show that the wells would be unproductive and dry, and to excuse the plaintiffs from digging a well in order to demonstrate the barrenness of the premises in the production of oil. In passing on the case the following language was used:

“ If the testimony establishes the proposition that the plaintiffs pushed their investigations sufficiently to show that neither the Nelson nor Dodson well was one in which oil could be produced in paying quantities, they are entitled to recover. Their right cannot be defeated by proof that a trace of oil was discovered or even by proof that one of the wells might be made to produce a few barrels, for such production was not sufficient to make it a paying well. The Nelson well was put down 1,600 feet. The Dodson well 1,377 feet. Oil in Allegheny County is found, if at all, in the third sand. Both of these wells were drilled through the third sand, and little, if any, oil was discovered. Subsequent developments still further demonstrated their unproductiveness. They are surrounded by a circle of dry holes. No oil has been found in their vicinity. The plaintiffs are criticised because the wells ‘ were not shot, torpedoed or tubed,’ but it would seem that it is not necessary to do this unless the drilling shows some promise of oil. A torpedo may make oil flow more freely, but it will not produce oil from barren sand. There was no possible motive for the plaintiffs to omit anything required to make the wells a success. It was manifestly

for their interest that the wells should pay. There is no direct proof as to the amount to be paid for drilling the two wells, but if it were at the rate which the evidence shows was paid for similar wells in Allegheny County, the plaintiffs were obligated to pay nearly \$3,000. The comparatively small sum which they were to receive from the defendants in case the wells proved unproductive was no inducement to them to stop the work until every reasonable test had been made. Every incentive was in this direction. If the wells proved successful, it meant a fortune to the plaintiffs. If they failed, it meant a large loss even after the \$1,000 had been paid by the defendants. I am satisfied that the plaintiffs did all that the agreement required, and that nothing which they could have done would have developed oil in paying quantities in either of the wells in question.”²⁷⁵

§115. Test well.— Depth.

“ Can it be said that, in order to commence operations for a test well, the drill must actually commence to penetrate the rock? I do not so understand the meaning of the expression construed in connection with the facts presented by the record. In many places, in order to sink a well it is necessary that some sort of wooden or metallic casing be provided for the purpose of excluding the soil and clay which must be passed through before the rock is reached; and it would hardly be contended that the purchase and provision of the necessary material for such casing or cribbing was not an important step in putting down the well. Webster defines the word ‘operation’ as ‘an effect brought about in connection with a definite plan’; and, in giving the interpretation ordinarily ascribed to the words ‘to commence operations’— that is, applying to the words their common acceptance — I would understand the expression to mean the performance of some act which has a tendency to produce an intended result. For instance, if a man had determined to erect a brick house, and, in pursuance of that design, had quarried the rock on his own land to be used in the cellar walls and

²⁷⁵ Rice v. Ege, 42 Fed. Rep. 661.

foundation, and had burned a kiln of brick on the same premises for the purposes of constructing the walls and chimneys, it surely could not be said that he had not commenced operations, although the roads might then be in such a condition as to prevent him from hauling the stone and brick to the place he had selected for its location. Another familiar instance that may serve the purpose of illustration is the erection of locks and dams for the purpose of improving navigation by increasing the depth of the water. . . . When the location of the lock has been selected and stone has been quarried and prepared, although it has not been hauled to the location and no excavations have been made to receive it, we would not be warranted in saying that operations had not been commenced for the construction of the lock. And again, where a building has been destroyed by fire, how frequently do we hear it remarked that the owner commenced operations at once for the construction of another by clearing away the debris and contracting for the material with which to rebuild the structure? The terms of the covenant contained in said lease must be regarded as having been complied with, no matter how slightly may have been the commencement of any portion of the work which was a necessary and indispensable part of the work required in putting down the test well." ²⁷⁶

§116. Lessor and lessee by mistake locating well on stranger's land.

If the lessee and lessor by mutual mistake locate a well outside of the leased premises and on a stranger's land, the lessor cannot claim any part of the oil or gas as royalty, or rent for the well.²⁷⁷

§117. "Shooting" well.

Unless some statute prevent it, there is nothing to prevent a well owner from "shooting" it, in order to increase the flow of

²⁷⁶ *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203. See *Marshall v. Mellon*, 26 Pittsb. L. J. (N. S.) 290; 17 Pa. Co. Ct. Rep. 366.

²⁷⁷ *Mays v. Dwight*, 82 Pa. St. 462.

gas or oil, and even though it has the effect to drain the oil or gas from his adjoining neighbor's premises.²⁷⁸ But the owner may not "shoot" his well if it is situated in the center of a thickly populated city where he cannot collect the necessary quantity of explosives to "shoot" it, without endangering the lives and property of those who have no connection with his operations. In such an instance he must be content with such flow of gas or oil as can be obtained without such "shooting"; and an injunction will lie against him to prevent the accumulation or use of the explosives.²⁷⁹ So if a well is situated so close to a dwelling house as to endanger the house or its occupants, or even any building of value, if it be "shot," the owner of such well may not "shoot" it; and if he attempt or threaten to do so, he may be enjoined.²⁸⁰

§118. Oil lease, who entitled to gas.

Under a lease giving the right to drill and "gather" "all oil or gases" on the leased premises, in consideration of a part of the oil found, the lessee is entitled to all the gas found.²⁸¹ In passing on this question, the West Virginia Supreme Court used the following language:

"While the grant is for specific purpose of mining for and removing carbon oil and for none other, still there is necessarily included in this grant, all the incidents essentially or naturally pertaining to its enjoyment. Included in these are the elements such as light, air and water. And having the legal right to enter upon and occupy any portion of the premises, the appellant could, without becoming a trespasser or

²⁷⁸ People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Tyner v. People's Gas Co., 131 Ind. 408; 31 N. E. Rep. 61.

²⁷⁹ People's Gas Co. v. Tyner, *supra*. Tyner v. People's Gas Co., *supra*.

²⁸⁰ People's Gas Co. v. Tyner, *supra*. Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381.

²⁸¹ Eaton v. Wilcox, 42 Hun 61; Wood County, etc., Co. v. West Virginia, etc., Co., 28 W. Va. 210; 57 Am. Rep. 659. But see Kitchen v. Smith, 101 Pa. St. 452; Kier v. Peterson, 41 Pa. St. 357; Truby v. Palmer, 4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74; Palmer v. Truby, 136 Pa. St. 556; 20 Atl. Rep. 516. See Burton v. Forest Oil Co. (Pa.), 54 Atl. Rep. 266.

incurring any liability to the lessors, use and appropriate anything it might find thereon, which is not the property of another, such as animals *ferae naturae*, or waters percolating through the land, even though by such use and appropriation it may deprive another, having an equal right, of the power to do so. These are not the subjects of absolute property, and being therefore *jure naturae* capable of qualified ownership only, they belong to him who first appropriates them. If the hydrocarbon or natural gas now in controversy belongs to the class of things which are incapable of being absolute property, but are the subject of qualified property only, such as those above mentioned, then it is clear this gas was not the property of the plaintiff, and the appellant was not liable for its use and appropriation; but if, on the other hand, said gas is susceptible of absolute ownership, then it is a part of the realty of the plaintiff, to which the appellant has no right under said lease, and is, therefore, liable to the plaintiff for the value of the same. The important and decisive inquiry in this cause is, therefore: To which category does hydrocarbon gas belong? In the article on 'Gas and Gas Lighting,' in the Encyclopedia Britannica, it is stated that inflammable gas is formed in great abundance within the earth in connection with carbonaceous deposits, such as coal and petroleum; and similar accumulations not unfrequently occur in connection with deposits of rock-salt; the gases from any of these sources, escaping by means of fissures or seams to the open air, may be collected and burned in suitable arrangements. Thus the 'eternal fires' of Baku, on the shores of the Caspian Sea, which have been known as burning from remote ages, are due to gaseous hydrocarbons issuing from and through petroleum deposits. In the province of Szechuen, in China, gas is obtained from beds of rock-salt at a depth of 1,500 or 1,600 feet; being brought to the surface, it is conveyed in bamboo tubes and used for lighting as well as for evaporating brine; and it is asserted that the Chinese used this naturally evolved gas as an illuminant long before gas lighting was introduced among European nations. . . . It is apparent from this history of the nature and properties of natural gas that it partakes more nearly of the character of the

elements, air and water, than it does of those things which are the subject of absolute property. . . . The right of appropriation is so absolute in the case of water flowing under ground that if the owner of land in digging a well or cellar or working a mine on his own premises cuts off the water, which by percolation supplies his neighbor's well and thereby diverts it into his own or drains the well of his neighbor, the latter is without remedy; it is *damnum absque injuria*, if not negligently or maliciously done. If this were an open spring producing oil and gas or such a natural emission of gas as that at Bloomfield, in New York, or that at the Burning Spring, in Wirt County, West Virginia, instead of a well 1,000 feet deep, there could be no more question, it seems to me, as to the right of the lessee to appropriate the gas under the provisions of this lease than there is of his right to consume the air and water upon the premises. What difference, then, is there between these cases and the well in question, which was opened in express conformity with the written terms of the lease? It is the same as if the well had been there before the lease was made."²⁸²

Where a lease provided that the lessor should receive a certain portion of the oil produced; and also provided that "should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of one hundred dollars per year for such well so long as gas therefrom is sold"; and the lessor brought suit to recover the gas rental, alleging that the lessee had marketed and sold gas from a well, it was held that an expert might testify to the necessity of removing the gas in order to successfully operate the well for the production of oil, as showing that the removal of the gas was consistent with the denial of the lessor's right to collect a rental therefor.²⁸³

²⁸² Wood County, etc., Co. v. West Virginia, etc., Co., 28 W. Va. 210; 57 Am. Rep. 659. *Contra*, Kitchen v. Smith, 101 Pa. St. 452.

²⁸³ Shewalter v. Hamilton Oil Co., 28 Ind. App. 312; 62 N. E. Rep. 708.

§119. Oil lease gives no right to gas if oil be not found.

If a lease be executed for the purpose alone of drilling for oil, and oil be not found, though gas be found, the lessee cannot insist that the lease has not terminated, on the ground that he had succeeded in developing a paying gas well or wells; and the lessee is not even entitled in equity to reimbursement, for the expense of his operations, out of the proceeds of the gas obtained. In passing on this question the court said: The lease "expressly declares the property shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any purpose whatever; and if no oil is found in paying quantities within four years from this date²⁸⁴ the lease shall be null and void. Oil was not found. It would be a clear perversion of language to hold that oil and gas are synonymous terms. The evidence is insufficient to prove that the word gas was omitted from the lease through fraud, accident or mistake. The doctrine of equitable estoppel is not applicable to the facts."²⁸⁵ On the second branch of the proposition above stated, this same court used the following language:

"The rights of the parties are determined by their contract, which is a law of their own making. It is a speculative contract, wholly at the risk of the lessees. If they obtain oil they make a profit, in some instances a very large one; while if they fail, the loss is wholly their own. They have no right to be reimbursed by the lessor, or out of their property, under any circumstances whatever. As before observed, it was a speculation pure and simple, in which the lessees assumed all the risk. They did so for the chance of getting seven-eighths of the oil. Upon what principle of equity can this risk be shifted upon the lessors, and they be required to pay for the expenditures which the lessees agreed to make at their own risk? It will be seen at a glance that there is no analogy between such case and that of a person who is in possession of land, under color of title, and innocently builds a house or barn, or makes other valuable and

²⁸⁴ The date of the lease.

²⁸⁵ *Truby v. Palmer*, 4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74.

permanent improvements upon it. In such case, in an action for the *mesne* profits, he may justly be allowed for the value of such improvements to the extent they have increased the value of the property. But here, the lessees did nothing but what they agreed to do at their own risk."²⁸⁶

§120. Eviction.—Ejectment.

If the lessor convey the leased premises to a third person, and the deed of conveyance is not made subject to the lease, there is a technical eviction of the lessee;²⁸⁷ but if the grantee had knowledge of the lease, the lessee's rights are not lost, and there is no breach of a covenant of warranty.²⁸⁸ The erection by the lessor of a building on the part of the land to be occupied by the lessee, but which does not interfere with his operations, is not an eviction.²⁸⁹ If the lease be made of a large tract, but the lessee is to occupy only a certain portion of it for his operations, he cannot maintain ejectment for such portions as he does not occupy.²⁹⁰ Ejectment, however, lies in favor of a lessee to recover possession from which he has been unlawfully deprived of the possession.²⁹¹ If a lessee goes into possession of premises already leased for the same purpose but accepts from the first lessee a sum of money on account of damages, and contracts with

²⁸⁶ *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

A lease gave the right to drill for oil and gas, and contained a provision for a certain rental if gas was obtained, without any distinction as to whether the gas was derived from gas or oil wells. It was held that evidence was not admissible to show that the word "gas," as used in the lease, in trade meant gas derived from a gas well, and not gas derived from an oil well. *Burton v. Forest Oil Co. (Pa.)*, 54 Atl. Rep. 266.

²⁸⁷ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216.

²⁸⁸ *Sanders v. Rowe (Ky.)*, 48 S.

W. Rep. 1083; 20 Ky. L. Rep. 1082; *Ream v. Goslee*, 21 Ind. App. 241; 52 N. E. Rep. 93; *Lake v. Dean*, 28 Beav. 607; *Demars v. Koehler*, 60 N. J. L. 314; 38 Atl. Rep. 808.

²⁸⁹ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216.

²⁹⁰ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566.

Solid mineral under the soil may be the subject of an action of ejectment. *Kirck v. Mattier*, 140 Mo. 23; 41 S. W. Rep. 252.

²⁹¹ *Erskine v. Forest Oil Co.*, 80 Fed. Rep. 583; *California Oil Gas Co. v. Miller*, 96 Fed. Rep. 12; *Messimer's Appeal*, 92 Pa. St. 168; *Long's Appeal*, 92 Pa. St. 171.

him as to damages in the future, he cannot defend against the payment of rent on the ground that he has been evicted by his landlord.²⁹²

§121. Failure of title, reimbursement of operator.

If a person in possession of oil land, in good faith believe he has good title thereto, either by way of ownership or as lessee, and under that belief drill a well or wells; and afterwards he lose possession, in an action of ejectment; he may retain out of the proceeds of the oil or gas produced during his occupancy a sufficient amount to reimburse himself for the cost of drilling the well. In discussing this case, the Supreme Court of Pennsylvania said:

“If this is a kind of improvement of an unusual character and one which particularly commended itself to the favorable opinion of the courts. It was an oil well with all the machinery and appliances necessary to its operation. Now, without this well and machinery, the oil could not possibly be obtained. After it was completed its operations were all for the benefit of the plaintiffs. They have actually received the entire advantage of its structure and maintenance without a penny cost to themselves and without any risk. All the cost and all the risk were borne by the defendants. . . . Obtaining oil from the bowels of the earth is a very different thing from obtaining crops from the surface of the ground. The oil exists only at a distance of hundreds of feet below the surface. If it is not developed by means of wells it is the same as if it had no existence at all. It is in a state of nature, of no use or value to the owner of the land. . . . Therefore, it is no hardship to them to repay to the defendants the bare cost of the well and appliances which belong to the plaintiffs now, and the whole benefits of which accrue to them alone. . . . It has cost the plaintiffs nothing, and we know of no good reason, in law or morals, why the reasonable claim of the defendants should not be allowed. . . . It is not a question of staying waste, but

²⁹²Horberg v. May, 153 Pa. St. 216; 25 Atl. Rep. 750.

of allowance for the cost of valuable improvements actually necessary and made in good faith. For such improvements compensation is allowed, whether that which is taken be mineral, oil or other substances of the land or not."²⁹³

§122. Lessee denying tenancy.

The rule that a tenant cannot deny his landlord's title does not embrace an oil or gas lease which the lessor had no right to give, if neither the lessee nor his assignee ever took possession or executed any powers or rights under it.²⁹⁴ Where a son joined in a lease with his father of the latter's farm, he being of full age and living on the farm with his father, and the royalty reserved to both of them was delivered to the father and his vendee, it was held, in an action brought by the son against the lessee to recover one-half of the royalty, that the lessee could show the circumstances under which the son signed the lease, not to deny the landlord's title, but to deny, as to the son, that the lease created the relation of landlord and tenant.²⁹⁵ If a lessee take a second lease of the premises from a person claiming adversely to the first lessor, he cannot refuse to pay rent under the second lease on the ground that the first lessor had the better title.²⁹⁶

§123. Uncertainty on lease.—Unconscionable.

If a lease be uncertain in its terms, and those parts in which it is not uncertain is unconscionable towards the party seeking to escape from its obligations, the court will seize upon such uncertainty in order to declare it void.²⁹⁷

²⁹³ Phillips v. Coast, 130 Pa. St. 572; 18 Atl. Rep. 998.

²⁹⁴ Marshall v. Mellon, 26 Pittsb. L. J. (N. S.) 290; 17 Pa. Co. Ct. Rep. 366; affirmed 179 Pa. St. 371; 36 Atl. Rep. 201. See Mays v. Dwight, 82 Pa. St. 462.

²⁹⁵ Swint v. McCalmont Oil Co., 184 Pa. St. 202; 38 Atl. Rep. 1020.

A lessee cannot compromise with an assailant of the lessor's title, and

use that as a defense to an action to recover royalty. Chambers v. Smith, 183 Pa. St. 122; 38 Atl. Rep. 522.

²⁹⁶ Hamilton v. Pittock, 158 Pa. St. 457; 27 Atl. Rep. 1079.

²⁹⁷ Eaton v. Wilcox, 42 Hun 61; Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. Rep. 35; 33 Wkly. L. Bull. 335.

§124. Diameter of wells.

A contract by a well driller to drill a well of a certain diameter is not substantially performed by boring one of less diameter, without any other excuse except to save time and expense, although for the purpose of testing the territory, a smaller well may be as effectual as a larger one would be.²⁹⁸ Unless the lease require the lessee to drill a well of a specified diameter, he has the right to determine the diameter of the well, limited, however, by the general rule that the diameter must be one that is great enough to furnish oil or gas in paying quantities, if that amount should be discovered. Or in other words, the diameter must be such as is in common use in oil or gas regions, and which common experience has shown to be necessary to produce good results.

§125. Contract to drill wells "in the vicinity."

A well driller offered to drill an oil well upon any one of the lessee's several leases that it should select. He also proposed, "If you decide to drill any more wells upon said leases or in the vicinity, . . . I am to have the contract." At the end of this written offer was written, "Accepted, contract to be drawn in accordance with the above proposition or bid," and after these words were written, "This is about right, and will be satisfactory to the Pittsburgh Company." A well was dug by the driller, without any contract being executed which proved to be a dry one. The lessee then abandoned the enterprise of sinking wells on about one thousand acres of contiguous lands held by it by lease, and on which the dry well had been sunk, but began sinking wells two miles away from the territory abandoned. It was held that the contract to drill wells did not cover the territory two miles away, for it applied only to lands "in the vicinity," and the lands two miles away was not "in the vicinity."²⁹⁹

²⁹⁸ Gillispie Tool Co. v. Wilson,
123 Pa. St. 19; 16 Atl. Rep. 36.

²⁹⁹ Sparks v. Pittsburgh Co., 159
Pa. St. 295; 28 Atl. Rep. 152.

CHAPTER IV.

DURATION OF LEASE.

- §126. Ordinary leases.
- §127. Diligent search.— Implied covenant.
- §128. Holding for speculation purposes.
- §129. Non-development of leased premises where no limit fixed.— Forfeiture.
- §130. Greater diligence required in developing oil than coal lands.
- §131. Acquiescence in delay.— Unavoidable accident.
- §132. Acquiescence in abandonment.— Damages.
- §133. Actual mining operations must be commenced.
- §134. In paying quantities.
- §135. Paying quantities, continued.
- §136. Gas in paying quantities.
- §137. Abandonment.
- §138. Lessee may abandon non-productive premises.
- §139. Completion of non-productive well.— Title.
- §140. Instances of abandonment.
- §141. Cessure of work after operations begun.
- §142. Surrender.
- §143. Surrender by substitution of tenants or assignment of lease.
- §144. Parol surrender.
- §145. Payment of rental instead of developing premises.
- §146. Recision for fraud.

§126. Ordinary leases.

In an ordinary lease the time of its duration is usually specified, so that no trouble arises over the length of time it is to run; but even it may contain so many conditions, "ifs and ands," that it is difficult to determine its life. But in the case of gas and oil leases, there is scarcely a lease in existence that does not contain conditional clauses which are determinative of its duration. Oil and gas leases are almost universally granted upon the condition that they are to terminate when all the oil or gas has been taken out of the leased premises. And almost

every oil or gas lease contains a clause requiring the premises leased to be developed, or partially developed, within a specified time, or the demise to terminate; and whether such a clause is inserted or not, the courts hold that the lease is granted upon an implied condition that the premises shall be speedily developed, and will seek an opportunity to hold that they have been abandoned (though usually not forfeited), if not developed with reasonable celerity.¹

§127. Diligent search.—Implied covenant.

It is the duty of the lessee to make diligent search and operation of the leased premises; and it is not necessary that a provision for such search or operation be inserted in the lease; for it is an implied covenant in every oil and gas lease that a diligent search and operation will be prosecuted.² And where the only consideration was the royalty, a failure on the part of the lessee to commence operations for eight months was held to be an abandonment.³

§128. Holding for speculative purposes.

An oil or gas lease cannot be held for merely speculative purposes.⁴ "No lease of land for a rent for a return to the land-

¹ Parish Fork Oil Co. v. Bridge-water Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655; Gadbury v. Ohio, etc., Gas Co. (Ind.), 67 N. E. Rep. 259; McKnight v. Natural Gas Co., 146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790.

² Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; Allegheny Oil Co. v. Snyder, 106 Fed. Rep. 764; 45 C. C. A. 604; Hewitt Iron Mining Co. v. Dessau Co., 129 Mich. —; 89 N. W. Rep. 365.

³ Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373.

Failure of the lessee for two years to develop the premises, after drilling a well, finding gas, and then

closing it, was held *prima facie* to authorize the grantor, who was to be paid \$100 per annum for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. Gadbury v. Ohio, etc., Gas Co. (Ind.), 67 N. E. Rep. 259.

⁴ Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Guffey v. Hukill, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; American Window Glass Co. v. Williams (Ind. App.), 66 N. E. Rep. 912.

lord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord. A man buying and paying for land may do with it as he likes — work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he stipulated to do.”⁵

**§129. Non-development of leased premises where no limit fixed.—
Forfeiture.**

In many early oil or gas leases no time was fixed when the premises should be developed. It was assumed that the lessee had interest enough in the lease to develop the premises. It seldom occurred to a land owner that a lessee had a lease on adjoining premises by which he could drain the oil or gas from beneath such owner's premises; or that he desired to keep the premises for future use. Forfeiture clauses in such leases were seldom inserted for failure to develop the premises leased. In time the land owner realized that he was getting no benefit out of his land by reason of the oil or gas that he believed or even was morally certain was lying beneath its surface, and he sought a way to avoid the lease. Courts found it essential to the administration of justice to give him relief, and lent their powerful aid to him.⁶ It is the duty of the lessee to develop the premises; and he can not hold the land for speculative purposes indefinitely, or even for a stated period, for a nominal rent, when a royalty is the chief object for the execution of the lease.⁷ “The fluctuating character and value of this class of

⁵ Rorer Iron Co. v. Trout, 83 Va. 397; 2 S. E. Rep. 713; Munroe v. Armstrong, 96 Pa. St. 307.

⁶ Brown v. Vandergrift, 80 Pa. St. 142; Island Coal Co. v. Combs, 152 Ind. 379; 53 N. E. Rep. 452; Maxwell v. Todd (N. C.), 16 S. E. Rep. 926; Ohio Oil Co. v. Hurlburt, 14 Ohio C. C. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305; Coffin-

berry v. Sun Oil Co. (Ohio) 67 N. E. Rep. 1069.

⁷ Twinlick Oil Co. v. Marbury, 91 U. S. 587; Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; Rorer Iron Co. v. Trout, 83 Va. 397; 2 S. E. Rep. 713; Allegheny Oil Co. v. Snyder, 106 Fed. Rep. 764; 45 C. C. A. 604.

property," said the Supreme Court of the United States, "is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which we today sell for a thousand dollars as its fair value, may by the natural changes of a week, or the energy or courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them." ⁸

Where a gas or oil lease was given for ten years, a certain portion of the oil obtained to be given as royalty, a fixed sum paid annually, and a test well to be completed within one year from the date of the lease, it was held that the lessee could not dig a test well within the year, and thus vest in himself the privilege to take out oil and gas for ten years in the whole territory; but he was bound, within a reasonable time thereafter, to sink other wells so as to develop the whole territory; and if he did not, he had abandoned or forfeited his right to the whole territory premises. The premises were covered by several separate leases on its several parts, and, of course, the test well was drilled under only one lease. The court held that the other leases were abandoned.⁹ A failure for seven years to put down a test well was considered such laches as to show an abandon-

⁸ *Twinlick Oil Co. v. Marbury*, Oil Co. v. Harris, 1 Ohio N. P. 132; *supra*. See *Coffinberry v. Sun Oil Co.* (Ohio) 67 N. E. Rep. 1069. 1 Ohio Dec. 157; *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep. 178;

⁹ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; Ohio 32 C. C. A. 560.

ment, and the lease was cancelled.¹⁰ A lessor will not be permitted to retain possession of the leased premises for the purposes of exhausting the oil or gas under the surface thereof by means of wells on adjoining land controlled by him, which would drain the oil from the leased premises.¹¹ An owner of land leased his premises to a gas company for ten years, and as much longer as gas was found in paying quantities, or the "rental" was paid as provided. If gas was found in quantities sufficient for manufacturing purposes, the gas company was to pay one hundred dollars per annum for each well from the time gas was used therefrom for such purposes. Until a well was drilled and gas used therefrom by the gas company, it was to pay fifty dollars a year "rent." It was held that the lease did not continue in force beyond the ten years, by reason of the fact that the lessee completed a paying well, which he closed and anchored, and yet continued to pay the rent.¹²

§130. Greater diligence required in developing oil than coal lands.

In the development of oil lands greater diligence is required than in the development of coal lands, to prevent a forfeiture or raise a presumption of abandonment. The Supreme Court of Pennsylvania thus speaks of the difference: "The appellant cites *Venture Oil Co. v. Fretts*,¹³ and *McNish v. Stone*,¹⁴ and other cases in which oil leases were considered and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil and, in case oil is found in paying quantities on the leased premises, to drill wells and raise the

¹⁰ *Crawford v. Ritchey*, 43 W. Va. 252; 27 S. E. Rep. 220; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237; *Ohio Oil Co. v. Hurlburt*, 14 Ohio Cir. Ct. Rep. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Welty v. Wise*, 5 Ohio N. P. 50.

¹¹ *Kleppner v. Lemon*, 176 Pa. St

502; 27 Pittsb. L. J. (N. S.) 21; 38 W. N. C. 388; 35 Atl. Rep. 109.

¹² *American Window Glass Co. v. Williams* (Ind. App.), 66 N. E. Rep. 912. See also *Gadbury v. Ohio, etc., Gas Co.* (Ind.), 67 N. E. Rep. 259.

¹³ 152 Pa. St. 451; 25 Atl. Rep. 732; 31 W. N. C. 432.

¹⁴ 152 Pa. St. 457, note.

oil, paying an agreed royalty therefor, has been held to convey no interest in the land beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and finding nothing gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the cases cited. The difference in the nature of the two minerals, and the manner of their production, has, however, resulted in considerable differences in the forms of the contracts or leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory and bring to the surface oil that, when in place in the sand-rock, was under the lands of adjoining owners, makes it important for each land owner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases regardless of operations, around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste, nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of *Venture Oil Co. v. Fretts*, *supra*, is not capable of application to the lease made by Callender to Meredith in 1828, for several reasons: (1) The Callender lease is in effect a sale of all the coal in the leased premises, and consequently a severance of the surface therefrom. (2) It is for one hundred years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. (3) The consideration of the grant was not the develop-

ment of the mineral value of the land, but the price fixed by the agreement and actually paid to the lessor in money."¹⁵

§131. Acquiescence in delay.— Unavoidable accident.

The time of the lease, at least for development of the premises, may be prolonged by the acquiescence of the lessor in the delay. And where the lease provided that a test well should be completed by a given time, "unavoidable accident" excepted, it was held that a recognition by the lessors of the unavoidable character of certain accidents delaying operations, coupled with acquiescence in such delay, was a waiver of the right to enforce the forfeiture clause of the lease.¹⁶ Acquiescence, however, with regard to the time within which a well is to be begun, is not a waiver of the time, within which it is to be furnished.¹⁷ An agreement that the lessee should have further time within which to complete the development of the premises, even if made after the lease has expired, is binding on the lessor.¹⁸

§132. Acquiescence in abandonment.— Damages.

If a lessor acquiesce in the action of the lessee in abandoning the leased premises, he will thereby terminate his lease and waive his right to damages accruing after the time of the abandonment. Especially is this true if the acquiescence is evidenced by the lessor taking possession and leasing the premises to third parties, even if the second lease is for another mining purpose.¹⁹

§133. Actual mining operations must be commenced.

A lease requiring the work of development to be commenced within a certain time, by drilling wells, requires actual drilling

¹⁵ *Plummer v. Hillside, etc., Co.*, 160 Pa. St. 483; 28 Atl. Rep. 853.

¹⁶ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839. See *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 640.

¹⁷ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293.

As to endorsement on lease for an extension of an Ohio lease and its recording, see *Northwestern Ohio, etc., Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio C. D. 188.

¹⁸ *Riddle v. Mellon*, 147 Pa. St. 30; 23 Atl. Rep. 241.

¹⁹ *May v. Hazlewood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564.

operations to be commenced within the time specified; and the mere erection of drilling apparatus will not be a compliance with its terms.²⁰

§134. In paying quantities.

A very common expression in oil and gas leases is that they are to continue so long as oil or gas is or can be produced in "paying quantities." This is a clause for the benefit of the lessee; for it is obvious that a prudent man would not want to pay rent for premises after they had ceased to be productive; nor would he care to operate them, on even a royalty, where the operating expenses were more than the income. Occasionally the phrase might be of value to the lessor; for should the lessee occupy considerable surface of the ground leased, it might be of more value to him for other purposes than to have it continued for oil or gas purposes. If a lease is conditioned that it is to continue "so long as oil is produced in paying quantities," its duration depends upon the intention of the parties, as ascertained from the circumstances of the case.²¹ If the lease is for a specified period, as for "three years," or as much longer thereafter as oil or gas might be found in paying quantities," then it extends only for three years, unless oil or gas be found in paying quantities before the expiration of the

²⁰ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452. In this case the lease was of coal lands, reserving a royalty on the output, requiring the lessee within a specified time to commence the work of development of the coal by opening shafts to remove it, and by opening mines so as to enable the coal to be mined and removed to market. It was held that this required actual mining operations to be commenced within the time named, and that the mere erection and equipment of shafts and mines by which coal might be mined was not sufficient. See *Duffield v. Rus-*

sell, 19 Ohio Cir. Ct. Rep. 266; 10 Ohio C. D. 472.

Neglect for forty years to develop premises on which a mining lease was given for ninety-nine years was held to be an abandonment. *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238; 28 S. E. Rep. 303.

²¹ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. Dec. 475. In paying quantity "means paying quantity to the lessee" even a small profit is a "paying quantity." *Lowther Oil Co. v. Miller, etc., Co.* (W. Va.) 44 S. E. Rep. 433; citing *Young v. Oil Co.*, 194 Pa. St. 243; 45 Atl. Rep. 121.

period named, or, in the illustration given, before the expiration of the three years.²² The use of the word "and" for "or" does not change the rule.²³ The interpretation of this clause has not by any means been uniform. Thus in New York a lease for a term of "twelve years from this date, or so long as oil is found in paying quantities," was held to be a lease for the length of time during which oil is found in paying quantities, and that fixed the duration of the term.²⁴ The reasonable interpretation of such a clause is that the lessee has that period of time fixed in the lease within which to develop the premises, and he is not bound to proceed to develop them as soon as the lease is granted, especially if he is to pay a fixed rent per acre or per year or otherwise, nor within what might be termed a reasonable time, so that he develops them before the period be determined.²⁵ But if he should fully develop them before the end of the fixed period, however long before, and clearly demonstrated that there is no oil or gas beneath the surface, then as soon as that fact is ascertained the lease is at an end. If a lessor has given a long period of time within which to develop the leased premises, that is his act and he cannot appeal to the courts to relieve him from the condition in which his own error has placed him. If the lease be for a certain period "and as long thereafter as oil is found in paying quantities," and the lessee fail after the fixed period to produce oil in paying quantities, the tenancy becomes one at will, not from year to year, and may be ended at any time by either party; and if oil, after the termination of the lease, be found in paying quantities, the lessee can not insist that his lease is still in force, nor claim any

²² *Shellar v. Shivers*, 171 Pa. St. 569; 33 Atl. Rep. 95.

²³ *Northwestern Ohio, etc., Gas Co. v. City of Tiffin*, 59 Ohio St. 420; 54 N. E. Rep. 77; *Cassell v. Crothers*, 193 Pa. St. 359; 44 Atl. Rep. 446; *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76; *Balfour v. Russell*, 167 Pa. St. 287; 36 W. N. C. 225; 31 Atl. Rep. 570; *Blair v. Northwestern, etc., Co.*, 12 Ohio

Cir. Ct. Rep. 78; 5 Ohio Cir. Dec. 620.

²⁴ *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61. See *Monfort v. Lanyon Zinc Co. (Kan.)* 72 Pac. Rep. 784.

²⁵ See *Blair v. Northwestern, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio Cjr. Dec. 620.

part of the oil.²⁷ A lease for two years "and as much longer as oil or gas would be found in paying quantities," requiring the lessee to commence a well within thirty and complete it within ninety days, and if no well was completed within the latter period, requiring the lessee to pay sixty dollars per year, the lessor to receive a certain part of the product as royalty, is terminated at the end of the two years, if oil or gas be not found in such quantities, and its life cannot be prolonged by the payment of the sixty dollars a year thereafter; for the life of the lease beyond the two years is dependent on the fact that oil or gas be found in paying quantities.²⁸ If the lease be for both gas and oil purposes and gas only is found the lessee is to pay a certain annual sum for each well, and if oil, pay a royalty; the production in paying quantities of either gas or oil, and the payment of gas rental, or the delivery of the oil royalty will prolong the lease during the time of such production.²⁹ Where a lease required the lessee, if oil be found in paying quantities, to pay the lessor, in addition to land money six hundred dollars within thirty days, the court considered it capable of enforcement. "The obvious intention was," said the court, "that if, for the period of thirty days after its completion, the well continued to produce oil in such quantities as to make it profitable to operate it during that period, the six hundred dollars should be demandable." The court continued its observations upon the phrase "paying quantities," by saying: "There is a great difference between a paying well, i. e., a well producing oil in paying quantities, and one that pays for itself. A mine for years may produce ore in paying quantities and be very profitable during that time, and yet, through a later depreciation in the value of the mineral extracted from the ore, or from accident or failure to yield enough ore, it may never repay its first cost."³⁰ It is for the operator, acting in good faith, to deter-

²⁷ Cassell v. Crothers, 193 Pa. St. 359; 44 Atl. Rep. 446; Williams v. Ladew, 171 Pa. St. 369; 33 Atl. Rep. 329.

²⁸ Western Pennsylvania Gas Co. v. George, 161 Pa. St. 47; 28 Atl. Rep. 1004.

²⁹ Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. Rep. 662.

³⁰ Collins v. Mechling, 1 Pa. Super. Ct. Rep. 594; 38 W. N. C. 235; 26 Pittsb. L. J. (N. S.) 459.

mine when the lease is no longer profitable; and the lessor cannot terminate it because it is not profitable to him to have it continue.³¹ It is for the lessee, or some one for him acting under the lease, to find oil in paying quantities on the premises; and if another find it in such quantities, not acting under the lease, that will not prevent a termination of the lease.³² Where the lessor reserved the right to select four acres out of a seventy-acre tract leased, and after the selection of the four acres the lessee drilled a well on the remaining part, but did not find oil; and, with the assent of the lessor, a well was drilled by the assignee of the lessee on the four-acre tract, which produced oil in paying quantities, it was held that the assignee was entitled to a continuance of the lease, for the reason that the leased property was producing oil in paying quantities.³³ A mere cessation of the use of gas from a well will not terminate the lease nor relieve the lessee from a liability to pay a rental so long as gas is produced in paying quantities, but the lessee must notify the lessor that the well has ceased to produce gas in such quantities, and for that reason he terminates and surrenders the lease.³⁴ Where a lease provided that if gas be "found in sufficient quantities to justify marketing" it an annual rent of five hundred dollars per annum for each well should be paid "so long as it shall be sold therefrom," and gas being obtained in such quantities to justify its marketing, it was held that the relation of landlord and tenant was established, and no good reason being shown why he should not, the lessee must market the gas and pay the rent.³⁵

§135. Paying quantities, continued.

Where the lessee was to commence a test well within ninety days from the date of the lease, and prosecute the drilling

³¹ *Young v. Forest Oil Co.*, 194 Pa. St. 243; 30 Pittsb. L. J. (N. S.) 221; 45 Atl. Rep. 121, reversing *Young v. Vandergrift*, 30 Pittsb. L. J. (N. S.) 39.

³² *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522. See *Garman v. Potts*, 135 Pa. St. 506; 26 W. N. C. 305; 19 Atl. Rep. 1071.

³³ *Balfour v. Russell*, 167 Pa. St. 287; 36 W. N. C. 225; 31 Atl. Rep. 570.

³⁴ *Double v. Union Heat, etc., Co.*, 172 Pa. St. 388; 37 W. N. C. 389; 33 Atl. Rep. 694.

³⁵ *Iams v. Carnegie Natural Gas Co.*, 194 Pa. St. 72; 45 Atl. Rep. 54.

“with due diligence to success or abandonment, and should oil be pumped or excavated in paying quantities on or before” the end of one year from the date of the lease, then the lease “to be null and void,” and the lessee began the prosecution of the work on time and prosecuted it until the middle of the year when he withdrew the casing and left the premises for over three months; and the lessee claimed he had found oil in paying quantities, but admitted he had never pumped any from the well, it was held that the prosecution to success required the production of oil or gas in quantities capable of division between the parties, according to the terms of the lease.³⁶ A lease to-run for a term of years, “or so long as oil or gas is found on the premises,” providing for the payment of a certain rental “each year in advance for every well from which gas is used off the premises,” renders the lessee liable only so long as he uses the gas; and upon the failure of the well, or if it becomes impracticable to use the gas therefrom, he is released from all liability.³⁷ Where the term was for years, and as much longer as gas or oil should be found in paying quantities; and one well was drilled which produced gas in paying quantities, and then failed; it was held, upon failure of the well, that the lessee was entitled to a reasonable length of time to drill at another location on the premises, for the purpose of finding oil or gas. “Does the language mean,” asked the court, “that it is only so long as gas or oil is found in paying quantities in the first well drilled, and that, when it fails, the lease expires as to the entire premises? The whole premises was held by this lease for five years, and as much longer as gas or oil is found in paying quantities; not found in paying quantities

³⁶ Kennedy v. Crawford, 138 Pa. St. 561; 27 W. N. C. 306; 21 Atl. Rep. 191.

An offer to prove that the phrase “paying quantities” has a known significance in oil regions must be accompanied by an offer to show that such significance existed when the lease was executed in the neighborhood in which the leased prem-

ises were situated, or that the usage was known to the lessor and lessee at that time. Collins v. Mechling, 1 Super. Ct. (Pa.) 594; 38 W. N. C. 235; 26 Pittsb. L. J. (N. S.) 459.

³⁷ Indianapolis Gas Co. v. Teters. 15 Ind. App. 475; 44 N. E. Rep. 549. See Monfort v. Lanyon Zinc Co. (Kan.) 72 Pac. Rep. 784.

in one well, but found in such quantities when proper and reasonable search is made for it.”³⁸ Where on the first of September an annual rental from the date of drilling a gas well was payable, and the well was drilled November 1, 1893, and the rent for the two succeeding years was paid, but on September 1, 1896, the well was abandoned as unprofitable, it was held that the lessor was entitled to recover a ratable part of the annual rental for the year in which the well was abandoned, but could not recover rent for the time after such abandonment.³⁹ If a rental is to be paid for a gas well and a royalty for the oil produced, the lessee is not liable for rental for a gas well which produces a little gas, although the gas from it is used for running the boilers on the premises.⁴⁰ An agreement to prospect, and if oil be found in a certain amount the royalty to be not less than a designated amount of money, and that a failure to surrender the lease by a certain day shall be an agreement that there is sufficient oil to pay the royalty named, will not render a failure to surrender conclusive of the amount of the oil found, but it will cast upon the lessee the burden to show that the amount found was less than the amount specified in the lease.⁴¹ A lease for three years, or so long as oil or gas should be found in paying quantities, provided that the lessor was to receive a share of the oil produced; and if gas was found producing one hundred pounds pressure to the square inch in thirty seconds, the lessee had the right to consume enough, free of cost, to light and heat his dwelling; but if it exceeded two hundred pounds, he was to pay a certain rental per well; it was held that he was not bound to pay any rental, or compensation or damage for occupation or use of the premises before or after the expiration of the three years, where, during such three years, he had drilled only one well which produced a pressure of less than two hundred pounds, but which had furnished gas for lighting and

³⁸ Blair v. Northwestern Ohio, etc., Co., 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. 619.

³⁹ Moon v. Pittsburgh Plate Glass Co., 24 Ind. App. 34; 56 N. E. Rep. 108.

⁴⁰ Taylor v. Peerless, etc., Co., 7 Ohio Cir. Dec. 368; 14 Ohio Cir. Ct. Rep. 315.

⁴¹ McCahan v. Wharton, 121 Pa. St. 424; 15 Atl. Rep. 615.

heating his residence.⁴² A lease containing a provision that the premises shall be worked so long as it can be "advantageously" done means so long as it can be "beneficially" or "profitably" done.⁴³

§136. Gas in paying quantities.

A somewhat different rule from that followed in oil wells must be adopted when the phrase paying quantities is applied to a gas well, or, perhaps, to speak more accurately, the phrase "paying quantities" as applied to a gas well requires different conditions to render the lessee liable than it does to render him liable when applied to an oil well. In the early operation of oil wells the oil flowed from the well; but as the supply lessened, or the pressure of gas beneath it decreased, pumping was introduced. It was found that oil wells could be pumped at little expense, and their operation remain profitable. Many wells, hundreds of feet apart, could be operated with a single power plant of no great power. But in the case of gas it was different. The pressure at the mouth of the well was the force first used to carry the gas through the pipes to the consumer, who was often many miles away. Gradually pumps were introduced, when the pressure of the gas declined, or it was desired to carry it to a longer distance than the ordinary pressure would carry it. A gas pump is a costly instrument; and to operate it requires experts and costly machinery and a large amount of capital. Even today it may be said to be an unusual thing to pump gas; while it is a universal thing to pump oil. These phases of the subject have been ably discussed by the Supreme Court of Pennsylvania, in the following language:

"A lease of a mine or a quarry, at a rental to be fixed by reference to the quantity of material removed therefrom, implies an agreement on the part of the lessee to work the mine or quarry. The reason is that, while the lessor does not lose his material out of the mine or quarry, he loses his income there-

⁴² Oak Harbor Gas Co. v. Murphy, 506; 26 W. N. C. 305; 19 Atl. Rep. 7 Ohio Dec. 700. 1071.

⁴³ Garman v. Potts, 135 Pa. St.

from. A lease of land for oil purposes imposes a somewhat different obligation upon the lessee. The oil is of such a nature that, if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land, that is, to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit, grows out of the nature of oil, and the methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the known characteristics of the business. Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes such classification is natural and appropriate, but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease. Oil, when brought to the surface, is gathered into a receiving tank or tanks at or near the well. When necessary or desirable, it is removed by gravity or by pumping into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks except that of gravity. The well that throws off violently its five thousand barrels per day and that which reluctantly gives up four or five barrels under the persuasive power of the pump will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumers' line. If the pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason, a well producing gas in sufficient quantity to be

profitably utilized if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In an oil district, each well, no matter how large or how small its product may be, is separately operated, and a well may be profitably operated so long as its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line so long as the pressure is sufficient. When the pressure in any one falls below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and, unless, it can be used near by, it is valueless. These well known facts peculiar to the production of gas must be taken into account in the construction of leases for gas purposes." "As we have already seen, every barrel of oil brought to the surface may be utilized in the same manner. Whether the well that produces it is a strong one, yielding many barrels per day, or a weak one, yielding but few, is a matter that in no way affects the ability of the producer to market his oil, or the prices to be obtained for it. In gas territory, the lessee may sink many wells and find gas in them all, but he can only utilize such of them as have a volume and pressure sufficient to enable him to transport the gas through his line and deliver it to the purchaser. If no one of them has the requisite pressure, then no one of them can be utilized; the gas must be wasted, the cost of the wells will be lost, and the lessor entitled to no royalty. What is the proper way to develop and operate a gas lease is, therefore, a question beset with some difficulty. Its settlement requires some general knowledge of the business, and some knowledge of the local field. The lessee may have a good well, from which he can utilize the gas with profit. He may put down another on the same farm, and thereby so reduce the pressure in the first as wholly to destroy its value, without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure at each is below the necessary standard, the whole is lost. Thus the application of the rule laid down by the court below, as the

jury must have understood it, might result in this, that the effort of the lessee to discharge the implied obligation of his contract for the common benefit, should end in the total destruction of the leasehold, and a common misfortune. The mistake of the court below was in failing to take account of and to read into the contract between the parties, the peculiar nature and characteristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows were before their minds when it was entered into." ⁴⁴ So long, however, as the lessee sells gas from a well, by running it into pipes connected with it, it is conclusive evidence of the right of the lessor to recover rent.⁴⁵ A gas well that supplies five stoves, one grate, three jets, and two street lights produces gas in paying quantities, where, after the quantity is known, all parties thereto join in or assent to the laying of pipe for its use and the expenditure of money for such materials and work.⁴⁶

§137. Abandonment.

The distinction between an abandonment and a forfeiture is often so thin as not to be distinguishable. And yet, broadly speaking, there is a difference, which may in a measure be stated thus: An abandonment rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury;⁴⁷ while a forfeiture does not rest upon an intent to release the premises, but is an enforced release. The act that authorizes the declaration by the lessor of a forfeiture may be unintentionally, or unavoidably, committed by the lessee, with no design to relinquish his lease. and yet will work a for-

⁴⁴ *McKnight v. Manufacturers', etc., Co.*, 146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790; *Indianapolis Gas Co. v. Teters*, 15 Ind. App. 475; 44 N. E. Rep. 549. See *Glasgow v. Chartiers Oil Co.*, 152 Pa. St. 148; 25 Atl. Rep. 232.

⁴⁵ *Hankey v. Kramp*, 12 Ohio Cir. Ct. Rep. 95; 5 Ohio C. D. 439.

⁴⁶ *Herrington v. Wood*, 6 Ohio Cir. Ct. Rep. 326; 3 Ohio Cir. Dec. 475.

⁴⁷ *Beatty v. Gregory*, 17 Ia. 109; *Bartley v. Phillips*, 165 Pa. St. 325; 30 Atl. Rep. 842; *Whitcomb v. Hoyt*, 30 Pa. St. 403; *Calhoon v. Neely*, 201 Pa. St. 97; 50 Atl. Rep. 967; *Lowther Oil Co. v. Miller-Sibley Oil Co.* (W. Va.) 44 S. E. Rep. 433.

feiture. It, however, matters little to the lessee or lessor, for in either instance he loses his lease and his term is ended. Whether or not a lease has been abandoned is a matter of defense, and need not be negatived by the plaintiff in an action for the rent.⁴⁸ If the lessee in fact abandon the lease for the purpose for which it was granted, it is not necessary for him to yield up actual possession of the surface, to enable the lessor to declare an abandonment has been made.⁴⁹ Rent falling due or accruing before abandonment must be paid.⁵⁰ The lessee cannot abandon a part of the premises and retain a part; to render his act of abandonment effectual he must abandon the whole premises and all his rights under the lease.⁵¹ If the lessor acquiesce in the temporary or other cessure of work for a period extending beyond the time when the work was to have been completed, he cannot because of each cessure, especially where the lessee has resumed operations at a considerable expense to himself, insist that there has been an abandonment.⁵² "As against any one but the grantor, an abandonment is not complete until the statutory period of limitation or the end of the term granted, and possession may be resumed by the grantee at any time previous."⁵³ A privilege to mine for gold that is a personal privilege, is terminated by abandonment by the person to whom it was given.⁵⁴ If the lease be once abandoned, the lessee cannot resume operations under it, without the consent of the lessor.⁵⁵ Expenses of a grantee in drilling wells after abandonment and notice by the lessor not to drill them cannot be recovered from the grantor.⁵⁶

⁴⁸ *McDowell v. Hendrix*, 67 Ind. 513.

⁴⁹ *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981; reversing 42 Hun 61; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 249.

⁵⁰ *Buhl v. Thompson*, 3 Penny (Pa.) 267. See *Smiley v. Western, etc., Co.*, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 1.

⁵¹ *Bestwick v. Ormsby Coal Co.*, 129 Pa. St. 592; 18 Atl. Rep. 538.

⁵² *Riddle v. Mellon*, 147 Pa. St. 30; 23 Atl. Rep. 241.

⁵³ *Bartley v. Phillips*, 165 Pa. St. 325; 30 Atl. Rep. 842; *Bartley v. Phillips*, 179 Pa. St. 175; 36 Atl. Rep. 217. See *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981; reversing 42 Hun 61.

⁵⁴ *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710.

⁵⁵ *Cole v. Taylor*, 8 Pa. Super. Ct. Rep. 19.

⁵⁶ *Detlor v. Holland*, 57 Ohio St.

§138. Lessee may abandon non-productive premises.

As the object in leasing oil or gas premises is to secure the oil or gas beneath the surface, as soon as it has been demonstrated that no oil, in case of an oil lease, or no gas, in case of a gas lease, is beneath the surface, or it does not exist in paying quantities, the lessee may abandon the premises or his lease; or if the oil or gas becomes exhausted he may in like manner abandon them. This is true of other minerals. Thus where a lease required the lessee to mine at least a certain quantity of iron ore each year and pay a royalty thereon, or even if not mined pay the royalty, it was held that if the ore become exhausted during the term the lessor was not thereafter entitled to royalties.⁵⁷ And the same is true if the mineral is not merchantable; for it cannot be understood that the parties contemplated the mining of unmarketable ore.⁵⁸ Where a lessee covenanted to pay so much for each ton of coal mined, and for any period of three years after the first the aggregate royalty should not be less than ten thousand dollars, whether ore to that extent was mined or not, it was held that the lessee could show as a defense, when an action was brought to recover the royalty due for the second period of three years, that the ore contained in the leased premises was not sufficient in quantity to produce the amount of rent or royalty claimed by the lessor, and that too even though judgment for the rent due on the first period of three years had been recovered.⁵⁹ But an absolute agreement to pay for so much coal, whether there is coal or not, will defeat a defense that there was no coal on the leased premises.⁶⁰

492; 49 N. E. Rep. 690; 39 Wkly. L. Bull. 187.

⁵⁷ Hewitt Iron Mining Co. v. Des-sau Co., 129 Mich. —; 89 N. W. Rep. 365.

St. 138; 9 Atl. Rep. 144. See Johnston v. Cowan, 59 Pa. St. 275; Grib-

⁵⁸ Muhlenberg v. Henning, 116 Pa. ben v. Atkinson, 64 Mich. 651; 31 N. W. Rep. 570; Cook v. Andrews, 36 Ohio St. 174; Brick. etc., Co. v. Pond, 38 Ohio St. 65; Read v. Beck,

66 Iowa 21; 23 N. W. Rep. 159. *Contra*, Clark v. Midland, etc., Co., 21 Mo. App. 58; Indianapolis, etc., Co. v. Teeters, 15 Ind. App. 475; 44 N. E. Rep. 549.

⁵⁹ Kemble Coal and Iron Co. v. Scott, 90 Pa. St. 332; Boyer v. Fulmer, 176 Pa. St. 282; 35 Atl. Rep. 235. See McCahan v. Wharton, 121 Pa. St. 424; 15 Atl. Rep. 615.

⁶⁰ Timlin v. Brown, 158 Pa. St. 606; 28 Atl. Rep. 236.

§139. Completion of non-productive well.— Title.

So thoroughly fixed in the law of oil or gas leases is the principle that if the leased premises prove non-productive no title to them vests in the lessee, that the completion of a non-productive well, even though at great expense, will not vest a title to such premises in the lessee.⁶¹

§140. Instances of abandonment.

Ceasing to operate a coal mine, and removing the machinery and appliances, was held a sufficient abandonment, without a surrender of the lease or cancellation of mortgages of the leasehold that were on record.⁶² Where a lease of a coal mine was given in 1858, a rental to be paid per annum on a minimum amount of coal; but the lessee, thinking the mines not worth working, never went on the lands, and in 1871 ceased paying rent, it was held that in 1879 the lessor had a right to consider the premises abandoned and to relet them.⁶³ Where a coal lease requires the lessee, in case he abandoned the premises, to notify the lessor, it is immaterial whether or not he gives such notice, if he in fact abandon them; and finding quantities of coal that will not justify mining it will not change the rule.⁶⁴ Where a lease was executed in 1878, for oil and gas, but the lessees never entered upon the premises, because of the fact they had drilled a well near the leased premises which proved to be a dry well; and twelve years afterward the premises having become valuable by reason of other territory in the neighborhood proving to be good for oil, when the lessees claimed the leased premises, it was held that by their conduct they had not only abandoned but surrendered the premises.⁶⁵ A lease was given

⁶¹ *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Barnhart v. Lockwood*, 152 Pa. St. 82; 31 W. N. C. 209; 25 Atl. Rep. 237; *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320.

⁶² *Van Meter v. Chicago, etc., Co.*, 88 Iowa 92; 55 N. W. Rep. 106.

⁶³ *Porter v. Noyes*, 47 Mich. 55; 10 N. W. Rep. 77.

⁶⁴ *East Jersey Co. v. Wright*, 32 N. J. Eq. 248.

⁶⁵ *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237.

“ for the sole and only purpose of mining and excavating for petroleum, or carbon oil, gas, or other valuable mineral or volatile substances,” for twenty years, the consideration being one-eighth of the product. It provided that “ the party of the second part covenants to commence operations for said mining purposes within six months . . . on some one of the farms leased . . . and when oil is found in paying quantities, then he agrees to commence operations within sixty days upon the next adjoining farm leased by him, and so on until all lands (hereby) leased in the township are tested to success or abandonment.” The lessee began operations and drilled a well on another farm, but found neither oil nor gas. He made no further effort to test the land, for the reason that he thought the territory was worthless as oil land. Six years after the lessor gave a second oil lease on the territory to a third party. It was held that the last lease was valid, because the first one had been abandoned.⁶⁶ An oil lease provided that the lessees “ shall have the right at any time to surrender up this lease, and be released from all money due and conditions unfulfilled.” It gave the lessor no right to rescind. There was no express covenant on the part of the lessees to develop the land; but they agreed to bore a well or pay one hundred dollars a month if they did not. The lessees never took possession of the land. On the trial it was shown that after the first two payments had been made, two of the three lessees requested of the lessor for time on the third monthly payment; and it was agreed that the time should be extended three weeks, and if the rent by that time was not paid, they should surrender the lease. The money was not paid as agreed; and one of the lessees told the lessor that he could lease the property to any one, and that the lease would be returned. It was never redelivered. Sixteen months afterward the owner executed a second lease of the premises to a third party. It was held that there had been a rescission of the lease; and a tender of the monthly rental after the rescission could not revive the lessees’ rights or privileges.⁶⁷ Of course,

⁶⁶ *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732; 31 W. N. C. 432. ⁶⁷ *Hooks v. Forst*, 165 Pa. St. 238; 30 Atl. Rep. 846.

after the lessee has abandoned the lease the lessor is no longer bound.⁶⁸ A lease on a royalty of so much per ton, on coal mined, of coal lands for ninety-nine years is abandoned where nothing is done by the lessee for seventeen years;⁶⁹ and so for eleven years.⁷⁰ Under a five-year lease, or as long as gas and oil may be found in paying quantities, and a conveyance to the lessee of a part of the land is made, in the deed of conveyance, it being provided that it shall not affect the rights of the grantee under the lease and that a certain payment shall be in full payment of all the lease rental and royalty thereunder until the time when other wells are drilled and the product taken from them — the lessee cannot begin operations on the land not conveyed after the expiration of five years.⁷¹ A lease was given for ten years, and as long thereafter as oil and gas were found in paying quantities. The lessee was required to drill a well within one year. He had the right to abandon the premises at any time, but the abandonment was not to deprive him of the right to convey oil and gas over the land from other lands, on an annual rental. He completed a well on time, which was unproductive. Two years after the lease was granted, he notified the lessor of his intention to abandon the well; drew the casing, and removed all his machinery. Subsequently he drilled wells and conducted operations at great cost in the vicinity, but made no search on the leased premises. Five years after he abandoned his search, the lessor requested him to surrender the lease, which he refused to do, and afterwards recorded it. In an action involving its validity, he testified that he had never intended to abandon the lease; but the court held that a finding of abandonment was justified by the evidence.⁷² A non-exclusive right to enter on lands for mining purposes only and to prospect thereon and mine them, does not prevent the grantor and his grantees from

⁶⁸ *Cowan v. Radford Iron Co.*, 83 Va. 547; 3 S. E. Rep. 120.

⁶⁹ *Bluestone Coal Co. v. Bell*, 38 W. Va. 297; 18 S. E. Rep. 493. Oil lease abandoned by twenty years' non-user. *Wagner v. Mallory*, 41 N. Y. App. Div. 126; 58 N. Y. Supp. 26.

⁷⁰ *Welty v. Wise*, 5 Ohio N. P. 50.

⁷¹ *Simon v. Northwestern Ohio, etc., Co.*, 12 Ohio Cir. Ct. Rep. 170; 5 Ohio C. D. 456.

⁷² *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035; *Heintz v. Shortt*, 149 Pa. St. 286; 24 Atl. Rep. 316.

prospecting and mining on the same land; and no presumption of an abandonment of the first right granted arises from the fact that similar rights were exercised by the grantor and his grantee.⁷³ If a lease requires that the work of testing a well shall be prosecuted with due diligence, a cessure of operations for three months after work begun is an abandonment of it.⁷⁴

§141. Cessure of work after operations begun.

A cessure of work will operate as a termination of a lease by abandonment, especially where the first or second well proves to be a dry one. Thus where a lease was for "fifteen years, and as much longer as oil or gas is found in paying quantities"; and the lessee erected a "rig," drilled a test well, but obtained no oil; and thereupon removed the machinery used in drilling, leaving nothing but a wooden tank, which rotted, asserting no title to the premises for nine years, when other lessees found oil in paying quantities, it was held that the first lease had been terminated by an abandonment.⁷⁵ But a temporary suspension after the well has been sunk, which proves a dry one, while awaiting further developments in the vicinity, will not operate as an abandonment of the lease.⁷⁶ A cessure for two years,

⁷³ *Woodside v. Ciceroni*, 93 Fed. Rep. 1; 35 C. C. A. 177.

⁷⁴ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19; *Monroe v. Armstrong*, 96 Pa. St. 307; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. Rep. 978; 44 L. R. A. 107; *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320.

See also *Coffinberry v. Sun Oil Co. (Ohio)*, 67 N. E. Rep. 1069.

Where a lessee of a coal mine left his tools on the premises for two years, but did not work the mine, it was held he had not abandoned the mine, nor had he abandoned stone he had quarried and left on the ground. *Russell v. Stratton*, 201 Pa. St. 277; 50 Atl. Rep. 975.

⁷⁵ *Calhoun v. Neely*, 201 Pa. St. 97; 50 Atl. Rep. 967; *Barnhart v. Lockwood*, 152 Pa. St. 82; 31 W. N. C. 209; 25 Atl. Rep. 237; *McNish v. Stone*, 152 Pa. St. 457; 23 Pittsb. L. J. (N. S.) 232 *Rorer Iron Co. v. Trout*, 83 Va. 397; 2 S. E. Rep. 713; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 249; *American Window Glass Co. v. Williams (Ind. App.)*, 66 N. E. Rep. 912.

The lessees "were not bound to do more than make a reasonable search for oil, but they were bound to operate or quit; they could not hold or quit." *Munroe v. Armstrong*, 96 Pa. St. 317; *Ray v. Natural Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290.

⁷⁶ *Baumgardner v. Browning*, 12

although oil has been found in paying quantities, will work in equity a forfeiture of the lease.⁷⁷ Where a lease was to run fifteen years in consideration of a payment of fifty dollars, and one-eighth of the oil obtained; and the lessee covenanted to begin operations to secure oil "so as to complete the first well within six months from" the date of the lease, or thereafter within sixty days to remove all the machinery and buildings he had placed on the premises; and the lease provided that the lease should "be declared null and void unless further prosecuted after the first well drilled," and that the "time of getting oil" was of the "essence of the lease," it was held that such lease had become void, where one well had been drilled within the stipulated time, but thereafter no operations for mining purposes were prosecuted on the land during several years.⁷⁸ The fact that the cessure of work or operations was induced by the inclemency of the weather is no excuse.⁷⁹ Although a well be commenced on time, yet if it be not completed on time, the lease will terminate.⁸⁰ If a well be drilled and oil found, though the lessee remove the casing and plug the well, the well is considered completed.⁸¹ If the lease require work to be commenced within a certain time, and yet does not provide when a well shall be completed, yet the lessee may not suspend work after he has commenced drilling, but must push the work with ordinary diligence until the well is completed, either as a dry or producing well. So, too, if he is to begin the development of the leased premises by a certain time, he must prosecute the work in the manner in which the business is ordinarily carried on and with ordinary diligence until the search for oil or gas is ended, either by finding it, and thereafter operating the premises, or by

Ohio Cir. Ct. Rep. 73; 5 Ohio C. D. 394.

⁷⁷ *Cole v. Taylor*, 8 Pa. Super. Ct. Rep. 19; *Crawford v. Ritchie*, 43 W. Va. 252; 27 S. E. Rep. 220.

⁷⁸ *Heintz v. Shortt*, 149 Pa. St. 286; 24 Atl. Rep. 316.

⁷⁹ *Cryan v. Ridelspergen*, 7 Pa. Co. Ct. Rep. 473; *Steelsmith v. Gartlan*, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107.

⁸⁰ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

Time is of the essence of all contracts relating to mining property. *Waterman v. Banks*, 144 U. S. 394; 12 Sup. Ct. Rep. 646; *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452.

⁸¹ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

demonstrating that there is no oil or gas, and surrendering the leased territory.⁸² It is more especially true that the lessee must proceed to develop the territory if, after reaching oil or gas bearing rock, there be strong indications of oil or gas.⁸³

§142. Surrender.

A surrender involves the yielding up of the lease or the premises. It implies an action on the part of the lessee. If the lease does not give the lessee the right to surrender it or the premises, then an acceptance of it by the lessor, or at least an acquiescence that implies an acceptance, is essential to complete the act of surrender. But if the lease gives the lessee the right to make the surrender, then, of course, acceptance by the lessor is immaterial.⁸⁴ If the lessee retain and use the premises after he has delivered to the lessor a deed of release and surrender, he will be liable for the rents and royalties he was to pay under the lease.⁸⁵ Where the lessee has the right under the lease to rescind it at any time, he may surrender the premises by parol.⁸⁶ Where a lessee ceased to work a coal mine, said he would do nothing more under the lease, completely dismantled the mine,

⁸² *McNish v. Stone*, 152 Pa. St. 457; 23 *Pittsb. L. J.* (N. S.) 232; *Ray v. Natural Gas Co.*, 138 Pa. St. 576; 20 *Atl. Rep.* 1065; 12 *L. R. A.* 290.

⁸³ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 *Atl. Rep.* 19; *Lowther Oil Co. v. Miller-Sibley Oil Co.* (W. Va.) 44 *S. E. Rep.* 433.

Where a lease provided that if the lessee did not "commence a test oil or gas well" at a certain place "or vicinity in ninety days, this lease to be void," it was held that a test well having been completed on time and oil secured, the immediate withdrawing of the casing and plugging the well did not terminate the lease. *Stahl v. Van Vleck*, 53 *Ohio St.* 136; 41 *N. E. Rep.* 35.

An abandonment of the lease includes an abandonment of all rights

under the contract. *Paine v. Griffiths*, 86 *Fed. Rep.* 452.

Cessure of work for three months has been held to be an abandonment. *Kennedy v. Crawford* 138 Pa. St. 561; 21 *Atl. Rep.* 19. See *Monroe v. Armstrong*, 96 Pa. St. 307; *Steelsmith v. Gertlan*, 45 *W. Va.* 27; 29 *S. E. Rep.* 978; 44 *L. R. A.* 107; *Huggins v. Daley*, 99 *Fed. Rep.* 606; 48 *L. R. A.* 320.

⁸⁴ *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 *Atl. Rep.* 237; *McKinney v. Reader*, 7 *Watts* (Pa.) 123; *Whitcomb v. Hoyt*, 30 Pa. St. 403.

⁸⁵ *Bestwick v. Ormsby Coal Co.*, 129 Pa. St. 592; 18 *Atl. Rep.* 538.

⁸⁶ *Hooks v. Forst*, 165 Pa. St. 238; 30 *Atl. Rep.* 846; *Cochran v. Shenango, etc., Co.*, 23 *Pittsb. Leg. J.* (N. S.) 82.

moved off all the mining apparatus, and left the mine in such a condition that it would even become valueless by caving in, and three months afterward again entered on the premises against the protest of the lessor and forcibly attempted to sink a shaft outside of the limits of shafts specified in the lease — it was held that these facts showed a surrender by mutual agreement.⁸⁷ A surrender of the lease releases the lessee from all liability thereafter (though not from liability for past rents, or possibly damages); and the surrender will be binding on both lessor and lessee; and also upon the heir. If an heir accept the surrender of the lease, it will bind his co-heirs, even though they be minors, if for their benefit.⁸⁸ The assignee of a lease may surrender it, but the surrender will not release him from a liability to the assignor assumed in the assignment, as a payment of so much for each producing well drilled.⁸⁹ If the lessor only had a life estate, and at his death the remainderman offers to continue the lease on the same terms, the lessee cannot surrender the lease before the term for which it was given has expired.⁹⁰ A lease may be surrendered after suit brought to cancel it, by way of a compromise; and a purchaser of a majority of the stock of the lessee, (with knowledge of the compromise, at least) will be bound thereby.⁹¹

§143. Surrender by substitution of tenants or assignment of lease.

Without discussing whether a surrender must be evidenced by a writing, that having been discussed elsewhere, we will take up the question in this section of a surrender by substitution of tenants and to instances of an assignment of the lease

⁸⁷ *Worrall v. Wilson*, 101 Ia. 475; 70 N. W. Rep. 619.

⁸⁸ *Wilson v. Goldstein*, 152 Pa. St. 524; 25 Atl. Rep. 493.

⁸⁹ *Smith v. Munhall*, 139 Pa. St. 253; 21 Atl. Rep. 735.

⁹⁰ *Lake Erie, etc., Co. v. Patterson*, 184 Pa. St. 364; 39 Atl. Rep. 68.

⁹¹ *Southern Oil Co. v. Wilson*, 22

Tex Civ. App. 534; 56 S. W. Rep. 429.

In *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490, a surrender of a grant by a land owner to another of "all the oil and gas in and under" a certain tract of land, and providing penalties for delay in the drilling of the wells, it was held could not be made unless in writing.

by the lessee to third persons, the latter usually, if not always, being evidenced by a writing. And it may be stated generally, that if the laws will imply a surrender in a given instance, it is reasonably clear that the implication will arise from the acts of the parties, and need not be based upon proof of an oral agreement between the lessor and lessee. "The one, whether lessor or lessee, against whom such a surrender is asserted by the other, must have been a party to some action from which a surrender may properly be presumed by the court. The surrender should be indicated by acts."⁹² "If the lessee assign to a third person and the lessor accept rents from the assignee in peaceable possession, it may be presumed from this act of the lessor in accepting the rent due from his lessee through the hands of another in possession, that the lessor acquiesces in the assignment, but such conduct does not necessarily indicate that the lessor has been a party of the creation of a new tenancy. Such facts may constitute evidence of an assignment but not of a surrender, and if a surrender may be established by the further proof of a parol agreement between the lessor and the lessee, to which the assignee was not a party, this would be basing the essential fact constituting the surrender upon parol evidence of an express contract, and not deriving it by act and operation of law."⁹³ It therefore follows that a plea alleging that the lessee entered into negotiations with a third party named, and notified the lessor, who encouraged the lessee to sell and assign the lease to a third party, and therefore the lessee duly assigned and conveyed the lease to such third party, who entered upon the demised premises and was duly accepted as his tenant, and that the lessor collected rent from the assignee and recovered a judgment for rent which afterwards fell due, is insufficient, for it needed an averment that the assignee was substituted in place of the original lessee, with intent on the part of the parties to the demise to annul the obligation of the lease.⁹⁴ An assignment of the lease by the lessee does not release him from his liability to

⁹² *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

⁹³ *Heller v. Dailey*, *supra*.
⁹⁴ *Creveling v. De Hart*, 64 N. J. L. 338; 23 Atl. Rep. 611.

pay the rent due under it, even though the lessor collect rent from the assignee, and these acts, of course, are not equivalent to a surrender.⁹⁵ "Nor did the sale of the saloon by the tenant to Ruse," in the language of one court, "nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the grantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee, and accepted him as tenant of the premises.⁹⁶ Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee.⁹⁷ The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former to discharge the latter from further liability under the lease, both will be held liable to the lessor."⁹⁸ In order to prove a surrender, however, it is not necessary to show an express contract between the lessor and lessee; but it must be shown that the landlord by his conduct, as between himself and the assignee, "does not hold the latter merely to the obligation of an assignee of the term in possession, but has assumed an

⁹⁵ Frank v. Maguire, 42 Pa. St. 77; Sanders v. Sharp, 153 Pa. St. 555; 25 Atl. Rep. 524.

⁹⁶ Citing Shaw v. Partridge, 17 Vt. 626.

⁹⁷ Citing Harris v. Heackman, 62 Ia. 411; 17 N. W. Rep. 592.

⁹⁸ Grommes v. St. Paul Trust Co., 147 Ill. 634; 35 N. E. Rep. 820; 37 Am. St. Rep. 248. See also Way v.

Reed, 6 Allen 364; Hoerdt v. Hahne, 91 Ill. App. 514; Detroit Pharmacal Co. v. Burt, 124 Mich. 220; 82 N. W. Rep. 893; Charles v. Froebel, 47 Mo. App. 45; Levering v. Langley, 8 Minn. 107; Lyon v. Reed, 13 M. and W. 285; Lynch v. Lynch, 6 Irish L. R. 131; Lewis v. Brooks, 8 U. C. Q. B. 576.

attitude inconsistent with the continuance of the contract relation between him and the original lessee, and has treated the assignee as his own tenant by substitution.”⁹⁹ The taking of a new lease from a third party, or even from the first lessee, and putting the new lessee in possession of the premises, is a surrender, and nothing farther is required to make it effectual.¹⁰⁰

§144. Parol surrender.

If the written instrument, under which the lessee or grantee, or by whatever name he is designated, grants or gives an interest in the land, then, as we have seen, the surrender must be in writing;¹⁰¹ but if it be a mere lease, not under seal, although written and not giving an interest in the land, then it may be surrendered and released by parol.¹⁰²

§145. Payment of rental instead of developing premises.

As a general rule a lessee cannot prolong the life of a lease by the mere payment of rental,¹⁰³ especially where he has a certain period within which to develop it. Thus where the lease was for two years “and as much longer as oil or gas is found in paying quantities or the rental paid thereon,” and it provided for a rent of one-eighth of the oil and two hundred and fifty dollars a year for the gas, and required one well to be completed within a month or fifteen dollars per month to be paid in advance for the delay until one well should be completed; and it also pro-

⁹⁹ *Heller v. Dailey, supra.*

¹⁰⁰ *Coe v. Hobby*, 72 N. Y. 141.

¹⁰¹ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

¹⁰² *Donahoe v. Rich*, 2 Ind. App. 540; 28 N. E. Rep. 1001; *Rhodes v. Thomas*, 2 Ind. 638; *Ward v. Walton*, 4 Ind. 75; *Knarr v. Conaway*, 42 Ind. 260; *Stockton v. Stockton*, 40 Ind. 225; *Wood L. and T., Sec.* 492; *Terstegge v. First German, etc.*, 92 Ind. 82; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

Where a penalty was imposed

only for not drilling a well within a certain prescribed time, a lessee's failure to give a written notice of the termination of the lease was held not to render him liable for the penalty provided for not drilling a well within such time. *May v. Hazelwood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 564.

¹⁰³ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76; *Gadbury v. Ohio, etc., Co. (Ind.)*, 67 N. E. Rep. 259; *American Window Glass Co. v. Williams (Ind. App.)*, 66 N. E. Rep. 912.

vided that a failure to complete one well or make such payments for the delay should render the lease void, at the option of the lessor, it was held that it did not give the lessee a right to continue the lease by paying the fifteen dollars per month after the expiration of two years, after the beginning of operations.¹⁰⁴ Where a lease was given for two years, and if no well was drilled within twelve months it was to become void, unless the lessee paid for further delay at the rate of one dollar per acre at or before the end of the second year, it was held that the payment of one dollar per acre did not extend the lease beyond the two years; and no oil having been found within two years, the right to drill for oil ceased.¹⁰⁵ But in Pennsylvania where a lease provided that the lessee had "the option to drill the well or not, or pay said rental or not, as he may elect," it was held that the lease did not give the lessee the option to pay a periodical rental, as was provided in the lease, or drill a well if it so pleased him, but he was bound to either drill a well and so pay no rental, or pay the rental and not be compelled to drill the well. "It is not for the lessor," said the court, "but it is for the lessee to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it a part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well

¹⁰⁴ *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566; a similar decision in Pennsylvania was rendered; *Western Pennsylvania Gas Co. v. George*, 161 Pa. St. 47; 34 W. N. C. 332; 28 Atl. Rep. 1004. See also *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690.

¹⁰⁵ *Brown v. Fowler*, 65 Ohio St. 507; 63 N. E. Rep. 76.

Upon a sufficient consideration the owner of land gave a lessee the exclusive right for ten years to enter on such land and prospect for oil and gas; and if oil or gas was found in paying quantities, the

privilege of operating the wells was given so long as they produced oil or gas in paying quantities. The agreement further provided that if no gas well was drilled on the premises within five years it should be void, unless the lessee elected from year to year to continue it by paying \$40 each year in advance until a well was completed on the premises. It was held that this was a grant of a term for ten years, conditioned on the payment of \$40 per year in advance after the expiration of the first five years. *Monfort v. Lanyon Zinc Co.* (Kan.) 72 Pac. Rep. 784.

within a given time, or, failing to do so, that he will pay a monthly rental, but that he will do neither unless it pleases him; and if he does neither he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract before we can consent to adopt it." ¹⁰⁶

§146. Rescission for fraud.

An oil or gas lease may be terminated or rescinded for fraud; but a very strong case must be made out to secure a rescission. A representation that undeveloped land contains oil or gas is regarded as a matter of opinion, and the purchaser is bound so to understand it; because of the uncertainty attending all mining operations for gas or oil.¹⁰⁷ But if the grantor or lessor actually knows that no oil or gas lies beneath the surface, or if he has taken active steps to produce a false impression derived from an examination of the premises — (as in "salting" a silver or gold mine) — then the representations are more than an opinion, and if false, and they induce the sale or acceptance of a lease, then such a fraud will authorize a rescission of the contract of purchase or acceptance of the lease.¹⁰⁸

¹⁰⁶ *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220.

A failure on the part of the lessee for two years to develop the premises, after drilling a well, finding gas, and then closing it, *prima facie* authorizes the lessor, who was to be paid \$100 per annum for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259. See also *American*

Window Glass Co. v. Williams (Ind. App.), 66 N. E. Rep. 912.

¹⁰⁷ *Holbrook v. Connor*, 60 Me. 578; *Gordon v. Butler*, 105 U. S. 553 (a case of stone).

¹⁰⁸ *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163; 9 C. C. A. 415; as to placing in *statu quo*, see *Reeves v. Corning*, 51 Fed. Rep. 74; *Billings v. Alfsen Mining, etc., Co.*, 51 Fed. Rep. 338; *Thackarah v. Haas*, 119 U. S. 499; 7 Sup. Ct. Rep. 311; *Gross v. Scott. Mfg. Co.*, 48 Fed. Rep. 35.

CHAPTER V.

FORFEITURE OF LEASE.

- §147. Forfeiture not a favorite of the law.
- §148. Rule in gas or oil leases.
- §149. History of change in rule giving lessor exclusive right to declare a forfeiture.
- §150. Forfeiture favored by equity when it will promote justice.
- §151. Lessor only can declare forfeiture.
- §152. Heirs or assignees of lessor may declare forfeiture.— Assignee.
- §153. Stranger cannot avail himself of forfeiture.
- §154. Lease may be voidable at election of lessee on his default, surrender.
- §155. Lessee cannot insist on forfeiture to escape rent.
- §156. Forfeiture clause omitted.
- §157. Implied covenants do not authorize forfeiture.
- §158. Notice of election to declare forfeiture.
- §159. Waiver of forfeiture.
- §160. Waiver of forfeiture by accepting payment.
- §161. Eviction of lessee.
- §162. Failure to operate and not for failure to develop.
- §163. Continuance of operation.
- §164. Production of gas will not prevent forfeiture of an oil lease.
- §165. Covenant uncertain.
- §166. Re-entry.
- §167. Release of premises equivalent to a re-entry.
- §168. Surrender after assignment.— Forfeiture.
- §169. Forfeiture of only part of lease.
- §170. Partial development.— Abandonment.
- §171. Lessee draining leased premises by wells on adjoining territory.
- §172. Lessee draining away oil by sinking wells on adjoining premises.
- §173. Inability to complete work.
- §174. Mortgage of leasehold may work a forfeiture.
- §175. When work must be completed.
- §176. Excavating for oil means bringing it to the surface.
- §177. Failure to pay royalties or to report them.
- §178. Payment of rent will not prevent forfeiture for neglect to develop.
- §179. Must pay rent although no oil on premises.
- §180. Lessee must pay past rents.— Damages.
- §181. Lessor consenting to abandonment.

- §182. Estoppel of lessor.
- §183. Demand for compliance with lease.
- §184. Abandonment a question of intention.
- §185. Forfeiture a question for jury.
- §186. Suit to cancel lease for non-development of territory.
- §187. Relief from forfeiture.
- §188. Time to avoid forfeiture.
- §189. Lessee cannot recover premises after forfeiture.
- §190. Reimbursement for expenses.
- §191. Removal of fixtures and machinery.
- §192. Damages instead of declaring a forfeiture.

§147. Forfeiture not a favorite of the law. .

In thousands of decisions it has been declared that "forfeiture is not a favorite of the law."¹ "Conditions that work forfeitures," said the Supreme Court of Pennsylvania, "are not favorites of the law; and nothing less than a clear expression of intention that a provision shall be such will make it a condition upon which the continuance of an estate granted depends."²

§148. Rule in gas or oil leases.

Forfeitures, however, on the part of the lessee in a gas or oil lease, which arise by reason of his neglect to develop or operate the leased premises, are rather favored by the law, because of the peculiar character of the product to be produced.³ The reasons for this have been well stated in a Pennsylvania case as follows:

"The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of

¹ *Lauman v. Young*, 31 Pa. St. 306.

² *McKnight v. Kreutz*, 51 Pa. St. 232; *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 29 Am. L. Reg. 93; *Henderson v. Coal and Coke Co.*, 140 U. S. 25; 11 Sup. Ct. Rep. 691.

³ That a gas or oil lease is construed more favorably to the lessor

than to the lessee, see *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350; and *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259; *American Window Glass Co. v. Williams (Ind. App.)*, 66 N. E. Rep. 912; *Coffinberry v. Sun Oil Co. (Ohio)* 67 N. E. Rep. 1069; *Lowther Oil Co. v. Miller-Sibley Oil Co. (W. Va.)* 44 S. W. Rep. 433.

a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results when attended with success; whilst these results led to a great speculation by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the land owner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases incompatible with the right of alienation and the use of the land. Without these guards, lands would be thatched over with oil leases by subletting, and a farm riddled with holes and bristled with derricks, or operations would be delayed so long as the speculator would find it hopeful or convenient to himself alone. Hence covenants become necessary to regulate the boring of wells, their number, the time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance, and put an end to the lease in case of injurious delay or a want of success. These leases were not valuable except by means of development, unlike the ordinary terms for the cultivation of the soil or for the removal of fixed minerals. A forfeiture for non-development or delay therefore cut off no valuable rights of property, while it was essential for the protection of private public interest in relation to the use and the alienation of property. In the present case the lease was modified by adding immediately after the clause of forfeiture a stipulation that, should the lessee not commence operation at a time specified, he should pay to the landlord thirty dollars for each and every month until such time as drilling should be commenced. The lessee, having paid for three months' delay, suffered eleven months to elapse without payment or tender, and then tendered the whole sum, which the landlord declined to accept, and insisted on the forfeiture, he in meantime having made a new lease to a party who went into possession. The learned judge below held that the lease was forfeited by the omission to pay the monthly sums, the lessee having done nothing in performance of his covenants.

We cannot pronounce this to be an error, in view of the nature of the lease, the true intention of the clause of forfeiture, and the want of any valuable interest acquired by the lessee, by performance. That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity, and protects the land owner against the indifference and laches of the lessee, and prevents a great mischief, as in the case of such lessees. To perpetuate an oil lease forever by the payment of a monthly sum, as here, at the will or caprice of the lessee, would work great injustice. The covenant of forfeiture was not abrogated entirely, but only modified.”⁴ In a subsequent case the same court used the following language:

“The agreement is plain that if the lessees failed to get oil in one well, they had a right to put down another, and as many more as they pleased, so long as they worked with diligence to success or abandonment, and equally plain that a cessation of thirty days would end their lease. They were not bound to do more than make a reasonable search for oil, but they were bound to operate or quit; they could not hold on and be idle. The contract did not require them to keep on drilling oil wells indefinitely and without cessation, for twenty years, nor for any indefinite length of time; neither did it entitle them, after the drilling of the well, to hold the lease for twenty years without working it. Even at the beginning of the lease, the duration of the term was qualified by the words, ‘unless forfeited.’ The question seems to be, shall the concise and clear expression of the agreement of these parties, as written, give way to imaginary terms more favorable to the lessees? What is there in the circumstances calling for a fiction to defeat the covenant against delay in searching for or producing oil? . . . If a well be productive, it is the interest of both lessor and lessee that it be

⁴ *Brown v. Vandergrift*, 80 Pa. St. 142.

continuously operated till its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent land owner guards against. Forfeiture for non-development or delay, is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. . . .

“ In the rapid development and exhaustion of oil lands, cessation of work for nine months is a long period. Often in far less time the fluctuation in prices of land and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other.”⁵

§149. History of change in rule giving lessor exclusive right to declare a forfeiture.

“ A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine it by re-entry. It was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent or other act of intended confirmation; whilst in the latter some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval and consequently confirmable. The force of this distinction, it is said, in Taylor on Landlord and Tenant,⁶ has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of this privilege.*⁶ But it is entirely optional with the lessor whether he will avail himself of his right or not, although by the terms of the proviso the term is to cease or become void for the non-performance of the covenant; and if

⁵ *Munroe v. Armstrong*, 96 Pa. St. 307.

⁶ Sec. 492.

*⁶ 2 Platt on Leases, 327.

the lessor does not avail himself of it the term will continue, for the lessee cannot elect that it shall cease or be void. Where there is a proviso in a lease that on non-payment of rent the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach made.⁷ The English law in this respect had been generally followed in this country, and such a lease is held to be good until avoided; though the lessee is estopped to set it up against the lessor. A lessee cannot avail himself of his own act to vacate a lease, on the principle that no man shall be permitted to take advantage of his own wrong.⁸ So Mr. Parsons, in his Law of Contracts,⁹ referring to the distinction formerly recognized between the effect of a proviso declaring that the lease shall be void in a specified event, and a proviso enabling the lessor to determine it by re-entry, says: 'This distinction is now exploded, and it is held that the lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void.' In Pennsylvania the older doctrine would seem at first to have been adhered to, that in a lease for years with condition, if the condition be broken by the lessee, his interest was *ipso facto* void by the breach, and no subsequent recognition of the tenancy could set it up.¹⁰ In the case cited there was a lease of land upon condition that the rent should be paid upon certain specified dates, and if a certain default was made for three months, neglect to pay after ten days' notice should render the lease null and void. The default occurred and notice was given, and it was held that after ten days the lease was *ipso facto* void, without re-entry, and could not afterwards be affirmed or continued. In *Sheaffer v. Sheaffer*¹¹ the doctrine announced by Justice Sergeant, in *Kenrick v. Smick*, *supra*, was adhered to; and English cases were brought into contrast with the doctrine of *Kenrick v. Smick*, and it is admitted that the rule of the English courts is followed in most of the States of the Union. In *Davis v. Moss*,¹² the rule of the previous cases is again appa-

⁷ *Reid v. Parsons*, 2 Chit. 247.

⁸ *Wood's Landlord and Tenant*, 1204.

⁹ Vol. I., p. 507.

¹⁰ *Kenrick v. Smick*, 7 W. and

S. 41.

¹¹ 37 Pa. 525.

¹² 38 Pa. 346.

rently recognized, but its rigor is relaxed in this, that the forfeiture is said to depend upon the terms of the instrument, 'unless there be evidence to effect the landlord with a waiver of the breach, like the receipt of rent or other equally unequivocal act.' The distinction between the Pennsylvania cases referred to and the weight of authority elsewhere, therefore, would seem to be that by the former the lease, upon breach of the condition, is *ipso facto* void, unless by some unequivocal act of the lessor it is waived, whilst by the latter it is void if the lessor elects by some positive act to take advantage of it. We do not understand that in either case a re-entry is required to complete the forfeiture. This, almost amounts to a distinction without a difference. In practice, the *prima facies* being different, it merely shifts the burden of proof from one party to the other. It will be observed moreover, that the Pennsylvania cases already referred to are all cases in which the forfeiture was set up by the lessor upon the default of the lessee; in none of them did the lessee set up his own default as a cause of forfeiture. No case has been called to our attention, in this or any other State, in England or elsewhere, which recognizes the doctrine that a party may take advantage of his own wrong, or set up his own default to work a forfeiture of his own contract. Persons may, of course, contract in this form and to this effect if they choose, but we do not understand the parties to this contract to have so intended. But the rigid rule of *Kenrick v. Smick* is further relaxed in the very recent case of *Galey v. Kellerman*.¹³ Thus it appears that the distinction formerly maintained between the rulings of the English courts and of the courts of our sister States, and the rulings in Pennsylvania, is no longer found to exist. We have by slow approaches at last apparently turned into the general current of cases, in which is found, without doubt, the great weight of authority, both in England and in this country."¹⁴

¹³ 123 Pa. 491; 16 Atl. Rep. 474. Atl. Rep. 721; 5 L. R. A. 603.

¹⁴ *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222; 18 For Pennsylvania cases, see preceding section.

§150. Forfeiture favored by equity when it will promote justice.

A forfeiture is not always abhorred by the law, nor by equity, if its enforcement will promote justice. Speaking of one instance it was said by an appellate court: "In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity, and protects the land owner against the indifference and laches of the lessee, and prevents a great mischief, as in the case of such lessees."¹⁵ The courts have gone so far as to allow a specified time within which to complete a well, and if not done within that time, the lease would be declared forfeited.¹⁶

§151. Lessor only can declare forfeiture.

A lessee cannot set up his own default, in order to terminate the lease or escape liability under its provisions. If he make default, not keeping the covenants of the lease, it is with the lessor to declare a forfeiture, or that it shall no longer be in force. If a mining lease provide that if the mine should not be worked the lease should be void, the word "void" means "voidable" at the election of the lessor; and it will be necessary for him to do some act evincing an intention to avoid it before it can be considered avoided or terminated.¹⁷ This is true even though a clause provides that a failure to do the thing covenanted to do "shall render this lease null and void,

¹⁵ *Brown v. Vandergrift*, 80 Pa. St. 142; *Munroe v. Armstrong*, 96 Pa. St. 307; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Barnsdall v. Boley*, 119 Fed. Rep. 191.

¹⁶ *Young v. Vandergrift*, 30 Pittsb. L. J. (N. S.) 39. Reversed in *Young v. Forest Oil Co.*, 194 Pa. St. 248; 30 Pittsb. L. J. (N. S.) 221; 45 Atl. Rep. 121. See *Ohio Oil Co. v. Hurlbut*, 7 Ohio Dec. 321; 14 Ohio C. C. 144, reversing 6 Ohio Dec. 305; *Henne v. South Penn. Oil*

Co. (W. Va.), 43 S. E. Rep. 147; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259.

¹⁷ *Roberts v. Davey*, 4 Barn. and Ad. 664; 1 Nev. and M. 443; *Bryan v. Bancks*, 4 Barn. and Ald. 401; *Bettman v. Harness*, 42 W. Va. 433; 26 S. E. Rep. 271; 36 L. R. A. 566; *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; *Smith v. Miller*, 49 N. J. L. 521; 13 Atl. Rep. 39; *Henne v. South Penn. Oil Co.*, 52 W. Va. —; 43 S. E. Rep. 147.

together with all rights and claims, and not binding on either party and not to be revived without the consent of both parties hereto in writing." "Such provisions of forfeiture," said the court, "are for the benefit of the lessor, and not for the benefit of the lessee. The lessee cannot plead his own default or wrong in discharge of his obligation to drill or pay rental."¹⁸ The lessor has the option to discontinue the lease, on default of the lessee, or affirm the continuance of the contract.¹⁹ Where a lease provided that the lessee's failure to complete a well within a certain period, or, in default thereof, to pay a certain yearly rental, should render the lease "null and void," and that all rights and claims should therefrom cease, "with like effect as if this agreement had never been made," it was held that the lessee, by his own default, could not relieve himself from liability already incurred.²⁰ In the instances just given parol evidence is not admissible to show the uniform construction of similar clauses by parties to such leases.²¹ Some of the courts

¹⁸ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62; *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522; *Jones v. Western, etc., Gas Co.*, 146 Pa. St. 204; 23 Atl. Rep. 386; 29 W. N. C. 266; *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474; *Ray v. Western, etc., Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Springer v. Citizens', etc., Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 210; *Smiley v. Western, etc., Gas Co.*, 27 W. N. C. 238; *Liggett v. Shira*, 159 Pa. St. 350; 33 W. N. C. 553; 25 Atl. Rep. 218; *Mathews v. People's, etc., Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 27 Pittsb. L. J. (N. S.) 421; 36 Atl. Rep. 216; *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502.

¹⁹ *Wills v. Manufacturers', etc., Gas Co.*, 130 Pa. St. 222; 18 Atl.

Rep. 721; 5 L. R. A. 602; *Ogden v. Hatry*, 145 Pa. St. 640; 23 Atl. Rep. 334; *Phillips v. Vandergrift*, 146 Pa. St. 357; 23 Atl. Rep. 347; *Leatherman v. Oliver*, 151 Pa. St. 646; 31 W. N. C. 205; 25 Atl. Rep. 309; *Agerter v. Vandergrift*, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 202.

²⁰ *Ogden v. Hatry*, *supra*; *Shetler v. Hartman*, 1 Pennyp. (Pa.) 279.

²¹ *Jones v. Western, etc., Gas Co.*, 146 Pa. St. 204; 29 W. N. C. 266; 23 Atl. Rep. 386.

Where a clause in a lease reads "and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained," it was held that the words "after such failure" referred to the continued failure to make the payment after it became due, and that the right of action to recover it was not affected. *Leatherman v. Oliver*,

have gone a long ways in upholding the rule that only the lessor can take advantage of the lessee's default. Thus where a lease provided that a lease must be completed within three months, and in case of a failure to do so, to pay a rental of \$25 a month, until the completion of one well; and then expressly provided that "a failure to complete such a well or to comply with any of the foregoing conditions, or to make any such payments within such time and at such place as above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will reinvest the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rental or not as he may elect"; this clause was considered not to give the lessee a right to avoid the lease; and he not having drilled a well could not set up a forfeiture to avoid paying rent.²² In discussing a case of this kind the Supreme Court of Pennsylvania used the following language:

"Whilst the obligation on the part of the lessee to operate is not expressed in so many words, it arises by necessary implication. . . . If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express

151 Pa. St. 646; 25 Atl. Rep. 309; 31 W. N. C. 205; *Conger v. National, etc., Co.*, 165 Pa. St. 561; 31 Atl. Rep. 1038; *Sanders v. Sharp*, 153 Pa. St. 555; 25 Atl. Rep. 524. The lessee cannot insist that the lessor exercise his right of option in order that he, the lessee, be released from his covenant. *Leatherman v. Oliver*, 151 Pa. St. 646; 25 Atl. Rep. 309.

²² *McMillan v. Philadelphia Co.*, 159 Pa. St. 142; 28 Atl. Rep. 220. See also *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 36 Atl. Rep. 216; and *Bartley v. Phillips*, 179 Pa. St. 175; 36 Atl. Rep. 217. The lease in *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; was almost as strong in the lan-

guage used, and a like result was reached by the court.

A lease for five years provided that a well should be completed within a year, or the lessee pay an annual rental until he did so. If the lessee failed to make any of the payments within ten days after the time specified, the lease should be void, and neither lessor nor lessee, after such failure, should have a right of action by reason of the breach. It was held that the failure of the lessee to make such payments did not relieve him of liability for the rent, nor prevent the lessor from maintaining an action for it. *Conger v. National, etc., Co.*, 165 Pa. St. 561; 30 Atl. Rep. 1038.

engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he suffered by drainage, for the territory might have proved unproductive; but, as the transaction was founded in the hope that either gas or oil, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default and become unable to pay, in which event he might put an end to the lessee's pretensions and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract; and, if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defense to an action in affirmance of the contract." ²³

**§152. Heirs or assignees of lessor may declare forfeiture,—
assignee.**

The lessor or his heirs may declare a forfeiture and make a re-entry.²⁴ So the devisee may declare a forfeiture and re-enter.²⁵ So may the lessor's assignees.²⁶ Where one, who was of age, of several children, all minors but he, and heirs of a

²³ Ray v. Natural Gas Co., 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290.

²⁴ Island Coal Co. v. Combs, 152 Ind. 379; 53 N. E. Rep. 452; Wilson v. Goldstein, 152 Pa. St. 524; 25 Atl. Rep. 493.

²⁵ Hayden v. Stoughton, 5 Pick. 528; Austin v. Cambridgeport, 21 Pick. 215.

²⁶ Island Coal Co. v. Combs, 152 Ind. 379; 53 N. E. Rep. 452.

deceased lessor, acting on behalf of all declared a forfeiture, the court said it would permit a repudiation of the declaration of a forfeiture, unless it be shown that it was for the benefit of such minors to enforce it rather than keep the lease alive.²⁷ And where the lessors were an adult and also a guardian of a minor, the latter alone was not permitted to declare a forfeiture.²⁸ These two last cases cover the statement that if there be several lessors, as joint or tenants in common of the same tract, a forfeiture cannot be declared and enforced, unless all join in the declaration. Where a conditional fee is conveyed, only the grantor or his heirs can take advantage of a breach of the condition, not even the assignee of the grantor can do so.²⁹

§153. Stranger cannot avail himself of forfeiture.

As only the lessor can avail himself of the right to declare a forfeiture, a mere stranger cannot set up, in order to defeat him in his rights, that the lessee has forfeited his right to the lease, so long as the lessor has not entered for or declared a forfeiture. Thus in an action of ejectment brought by the lessee of a lease against a mere squatter, where such lessee had established a *prima facie* case, it was held that the squatter could not avail himself of the lessee's want of diligence in prosecuting the work, as required by the lease, and insist that the premises had been abandoned.³⁰

§154. Lease may be voidable at election of lessee on his default.

A lease may, however, be so drawn that a lessee may take advantage of his own default. "Parties may agree that," said the Supreme Court of Ohio, "in case of failure to drill, or failure to pay, or both, the lessee shall be relieved of his obligation

²⁷ Wilson v. Goldstein, *supra*.

²⁸ Springer v. Citizens' Gas Co.,
145 Pa. St. 430; 22 Atl. Rep. 986.

²⁹ Upington v. Corringan, 151 N.
Y. 143; 45 N. E. Rep. 359.

³⁰ Bartley v. Phillips, 165 Pa. St.
325; 36 W. N. C. 19; 30 Atl. Rep.
842.

upon such terms as the parties may agree upon in the lease, whether the terms be of value to the lessor or inconvenience to the lessee; but a naked default and non-performance, as in this lease, cannot be held to discharge the obligation of the lessee." *³⁰ If the lessee may take advantage of his own default, he must surrender the lease if he would escape liability.³¹ Where a lease provided that "the lessee shall complete a well within six months from the date hereof or in default thereof pay to the party of the first part, for further delay, an annual rental of seven hundred dollars in advance on the said premises, from the time above specified until such well shall be completed, . . . and a failure to complete said well or pay said rental for ten days after the time above specified for so doing, shall render the agreement null and void, and it can only be renewed by mutual consent; and no right of action shall accrue after such failure to either party on account of the breach of any promise or agreement herein contained," it was held that the lessee had an option to drill a well within six months from the date of the lease and by paying seven hundred dollars within ten days thereafter, a further option for one year; and that the lessee, having a mere option, could set up his own default, availing himself of the elective right secured to him in his contract.³² If the terms of the lease expressly provide that the lease shall be voidable, at the option of either party, or the lessee; then the latter may unquestionably avoid liability by neglecting to comply with its requirements.³³ Where a lease provided that the lessee was to pay a bonus of one hundred dollars, and a royalty of one-eighth part of the oil produced; that it was to continue five years, and as much longer as gas or oil was found

*³⁰ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62; *Van Voorhis v. Oliver*, 22 Pittsb. L. J. (N. S.) 114.

³¹ *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95; *Johnstown, etc., R. R. Co. v. Egbert*, 152 Pa. St. 53; 25 Atl. Rep. 151; *Coulter v. Conemaugh Co.*, 30 Pittsb. L. J. (N. S.) 281.

³² *Van Voorhis v. Oliver*, *supra*. See *Ray v. Natural Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; *Glasgow v. Griffith*, 22 Pittsb. L. J. (N. S.) 181; *Ramsey v. White*, 21 Pittsb. L. J. (N. S.) 425.

³³ *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; *Liggett v. Shira*, 159 Pa. St. 350; 28 Atl. Rep. 218.

in paying quantities; if gas were found, then three hundred dollars rental per year for each well; and there was a proviso that "this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month"—it was held that the lease contained no covenant binding upon the lessee to pay rent, the only penalty imposed upon him being a forfeiture of his rights under the agreement. "But the payment," said the court, "was means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment."³⁴ Where an oil lease was given for a certain period, providing that it should become void and the rights of the lessee under it should cease unless a well should be completed on the premises within a certain period of time, or unless the lessee should pay a certain sum for each year the completion of the well should be delayed; it was held that the terms of the lease did not require the lessee to develop the land or pay the rent, the only penalty for such a failure being a forfeiture of his rights under it.³⁵

§155. Lessee cannot insist on forfeiture to escape rent.

A lessee cannot insist that he is not liable because the lessor had the right to declare a forfeiture, and that there were conditions authorizing him to declare forfeiture many years before, in order to escape the payment of rent. In such an instance it

³⁴Glasgow v. Chartiers Oil Co., 152 Pa. St. 48; 25 Atl. Rep. 232. "This case is not ruled," said the court, "by Ray vs. The Natural Gas Co., 138 Pa. St. 576 [20 Atl. Rep. 1065, 12 L. R. A. 290], and kindred cases." See Miller v. Balfour, 138 Pa. St. 183; 22 Atl. Rep. 86.

³⁵McKee v. Colwell, 7 Pa. Super.

Ct. 607; Snodgrass v. South, etc., Oil Co., 47 W. Va. 509; 35 S. E. Rep. 820.

In New Jersey, by 1 Gen. St., p. 880, Secs. 135 and 136, the defaulting lessee has the same right to declare a forfeiture as the lessor has. Boys v. Robinson (N. J. L.), 38 Atl. Rep. 813.

remains with the lessor to determine whether he will declare a forfeiture or insist upon the rent.³⁶

§156. Forfeiture clause omitted.

Where no forfeiture clause is inserted in a lease, either for failure to pay rent or develop the premises; and neither is done, there can be no forfeiture declared. But the failure to pay rent according to the terms of the lease, or to develop the premises, may be considered as sufficient evidence, if unexplained, to support the charge of abandonment.³⁷ And the usual rule is that a lease must state the condition upon which a forfeiture can be declared, or no forfeiture can be declared.³⁸ But where the lease was limited to twelve months or so long as gas should be found, for a certain royalty, and pay blank dollars per blank time (the blanks not being filled); it was held that a forfeiture could be declared.³⁹

§157. Implied covenants do not authorize forfeiture.

There can be no forfeiture for a violation of an implied covenant, unless the lease expressly so provides.⁴⁰ "A breach of the implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provides that a breach of such implied covenant shall avoid or forfeit the lease." "It is strongly urged that it is inequitable for the lessee to hold on to his lease, and still fail so to operate the premises as to produce reasonable results, and that he should either reasonably operate the premises or get off and permit his lease to be forfeited. The answer is that, while there is an implied covenant to reasonably operate the premises, there is no implied or express covenant to get off and forfeit his lease for a breach of such covenant. The lease

³⁶ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739. See *Bettman v. Shadle*, 22 Ind. App. 542; 53 N. E. Rep. 662.

³⁷ *Marshall v. Forest Oil Co.*, 198 Pa. St. 83; 47 Atl. Rep. 927.

³⁸ *Vandevoort v. Dewey*, 42 Hun 68.

³⁹ *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep. 981, reversing 42 Hun 61. See also *Barnsdall v. Boley*, 119 Fed. Rep. 191.

in question provides for a forfeiture for the failure to comply with the conditions, or to pay the cash consideration in the lease mentioned, at the time and in the manner agreed; but the implied covenant, to reasonably operate the premises, is not mentioned in the lease, and is therefore not included in the causes of forfeiture. Some causes of forfeiture being expressly mentioned, none other can be implied."⁴⁰ A few cases hold, however, that a breach of an implied covenant is sufficient to justify the declaration of a forfeiture.⁴¹

§158. Notice of election to declare forfeiture.

If the lessor be in possession, notice to the lessee of his intention to declare a forfeiture is not necessary, unless the lease provide for it; and if a notice is necessary, the execution of a second lease, to the knowledge of the first lessee, is a sufficient notice to him.⁴² A conveyance of the property in fee, by the lessor, after default made, is also a sufficient notice to the lessee, if one be required.⁴³ But if there has been a substantial performance, or a *bona fide* attempt at it, even though a forfeiture could have been enforced by making a demand and giving notice, the putting of another tenant on the premises, without such demand and notice, will not enable the lessor to have a forfeiture declared.⁴⁴ If the lessor give a lessee not in actual possession notice that the lease is forfeited, it is substantially a declaration that he will refuse to put him in possession.⁴⁵ Where

⁴⁰ *Harris v. Ohio Oil Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; 1 Ohio N. P. 132; 38 Wkly. L. Bull. 283; *McKnight v. Kreutz*, 51 Pa. St. 232; *Core v. N. Y., etc., Co.*, 52 W. Va. —; 43 S. E. Rep. 128. The remedy of the lessor was considered to be a suit for damages.

⁴¹ *King v. Edwards*, 32 Ill. App. 558; *Conrad v. Morehead*, 89 N. C. 31; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Eaton v. Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. Rep.

981, reversing 42 Hun 61. See *Coffinberry v. Sun Oil Co.*, 67 N. E. Rep. 1069.

⁴² *Allegheny Oil Co. v. Bradford Oil Co.*, 21 Hun 26, affirmed 86 N. Y. 638; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259; *Gadbury v. Ohio, etc., Gas Co. (Ind. App.)*, 65 N. E. Rep. 289.

⁴³ *Shepher v. McCalmont Oil Co.*, 38 Hun 37.

⁴⁴ *Kreutz v. McKnight*, 53 Pa. St. 319.

⁴⁵ *Carnegie, etc., Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

a lease provided that if there was a delay in developing the premises, after written notice by the lessee of a forfeiture, the lessee should have the right to pay an annual rent because of such delay, it was held that the execution of a second lease conditioned on the avoidance of the first, was not such a written notice as the lease required.⁴⁶ If the lessor has demanded excessive royalties, then his notice of a forfeiture is a nullity.⁴⁷ If he has such possession as entitles him to resist the entry by the lessee after a forfeiture, no notice of a forfeiture is necessary.⁴⁸ If the lessor desires to declare a forfeiture of the lease for the reason that the land has not been fully developed, although the lessee has entered and developed a part of it, he must give notice to such lessee of his intention to declare a forfeiture if the lease is not fully developed, and reasonable time must be given for the development.⁴⁹ But if a lease provide that it shall be subject to forfeiture on default of the lessee, and authorizes the lessor to take possession "without any notice or legal process," notice is not necessary.⁵⁰ So where the condition in a lease was that if no well should be completed within a year from the date of the lease, it should be void, unless the lessee pay a certain named sum of money annually during the time the well remained uncompleted, it was held that a failure to complete the well during the year, and an omission to pay the first annual amount, avoided the lease, without an election on the part of the owner to terminate it.⁵¹

§159. Waiver of forfeiture.

The right of a lessor to declare a forfeiture and re-enter on the leased premises because of that fact may be waived by him, and often is, either by express statements, or by conduct or by

⁴⁶ *South Penn. Oil Co. v. Stone* (Tenn. Ch.), 57 S. W. Rep. 374.

⁴⁷ *West Ridge Coal Co. v. Van Storch*, 5 Lack. Leg. N. 189.

⁴⁸ *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926.

⁴⁹ *Ohio Oil Co. v. Hurlbut*, 7 Ohio Dec. 321; 14 Ohio C. C. Rep. 144;

reversing 6 Ohio Dec. 305. See *Coffinberry v. Sun Oil Co.*, 67 N. E. Rep. 1069.

⁵⁰ *Fisher v. Dunring*, 53 Mo. App. 548.

⁵¹ *Kenton Gas., etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604.

acts.⁵² A waiver of the time, however, within which operations are to be commenced is not necessarily a waiver of the time for completion of a well.⁵³ In the case just cited the operations were to begin within sixty days, and a well to be completed within five months, and in either event the lease was to be forfeited. The lessor waived the sixty day provision; but this was held not a waiver of the five months' provision, even though the lease was assigned after the sixty day period. But if there has been such delay as entitles the lessor to declare a forfeiture, and without doing so, he permit the lessee to commence operations and sink wells on the land with his consent, he waives his right to insist on a forfeiture.⁵⁴ Even though the lease has expired, yet if the lessor permit the lessee to expend large sums of money in its development, thus leading the lessee to believe that it was not his intention to claim a forfeiture, he cannot then declare a forfeiture.⁵⁵ Mere silence, however, on the part of the lessor during the time given for the development of the premises will not be a waiver of the right to declare a forfeiture.⁵⁶ But delay in completing a well within time, with the assent of the lessor, who is anxious that the work be continued, and by his conduct and acquiescence clearly make it appear that he does not regard the delay as sufficient ground for declaring a forfeiture, is a waiver of the right to declare it.⁵⁷ Where a lease required seven wells to be put down, acquiescence in the failure to put down two or three of the preceding six wells was held a waiver of the right to declare a forfeiture as to the delay made in neglect to drill the seventh well on time.⁵⁸ Where an oil lease did not make time the essence of the contract, and the rent for delay for several years had been regularly paid, and at

⁵² *McCarty v. Mellon*, 5 Pa. Dist. Rep. 425; *Friend v. Mallory*, 52 W. Va. —; 43 S. E. Rep. 114.

⁵³ *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 28 Atl. Rep. 293.

⁵⁴ *Ohio Oil Co. v. Hurlbut*, 14 Ohio Cir. Ct. Rep. 144; 7 Ohio Dec. 321, reversing 6 Ohio Dec. 305.

⁵⁵ *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 649.

⁵⁶ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452; *Adams v. Ore Knob Copper Co.*, 7 Fed. Rep. 634.

⁵⁷ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839; *Riddle v. Mellon*, 147 Pa. St. 30; 23 Atl. Rep. 241.

⁵⁸ *Duffield v. Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566.

the time another year's rent fell due, the lessee was daily expending, and for ten days thereafter continued daily to expend, to the knowledge of the lessee, a sum equal to a year and a half's rent under a producing well, when he produced gas in a paying quantity, it was held that the lessee had waived his right to declare a forfeiture, six or seven days after such rent fell due, because of its non-payment at the stipulated time.⁵⁹ A delay for a very short time — as a day or so — will not work a forfeiture where the lessor by his acts and declarations has led the lessee into the belief that a forfeiture, because of such delay, would not be enforced.⁶⁰ Where the lessor, after acts sufficient for a forfeiture had taken place, gave a second lease on the premises, but endorsed on it, "This lease is taken subject to" the first lease, it was held that the second lease was not an unequivocal declaration of a forfeiture of the first one, and that the endorsement was such as to enable the lessee to have an erroneous endorsement made on the first lease corrected.⁶¹ Where the acts of the lessor tending to show a waiver are equivocal, the question of waiver is one for the jury.⁶² The lessor may waive the forfeiture, although in possession, affirm the continuance of the lease, and recover the sum agreed to be paid under its terms.⁶³ Where default was unintentionally made in the payment of rental while the lessee was engaged in drilling a second well, and the lessor, with knowledge of the default, suffered him to continue drilling, for some period of time (as, for two weeks), before declaring a forfeiture, and the lessee immedi-

⁵⁹ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 35 W. N. C. 558; 30 Atl. Rep. 984. See *Monfort v. Lanyon Zinc Co.* (Kan.) 72 Pac. Rep. 784.

The lessor must act promptly, and the result of enforcing the forfeiture must not be unconscionable. *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236.

⁶⁰ *Steiner v. Marks*, 172 Pa. St. 400; 33 Atl. Rep. 695. See *Clemin-*

ger v. Baden Gas Co., 159 Pa. St. 16; 28 Atl. Rep. 293.

⁶¹ *Schaupp v. Hukill*, 34 W. Va. 375; 12 S. E. Rep. 501.

⁶² *Wesling v. Kroll*, 78 Wis. 636; 47 N. W. Rep. 943; *Nelson v. Eachel*, 158 Pa. St. 372; 27 Atl. Rep. 1103.

⁶³ *Agerter v. Vandergrift*, 138 Pa. St. 576; 27 W. N. C. 230; 21 Atl. Rep. 202; *Ray v. Gas Co.*, 138 Pa. St. 576; 27 W. N. C. 230; 20 Atl. Rep. 1065.

ately offered to pay the rental, the court construed the actions of the lessor as an acquiescence in the drilling of the other wells, and refused to sustain the declaration of a forfeiture.⁶⁴ Receiving rent after default made will be a waiver of the right to declare a forfeiture for a failure to pay the rent at the time stipulated for its payment in the lease.⁶⁵

§160. Waiver of forfeiture by accepting payment.

An acceptance of rent for the defaulted period or any part of it will usually be a waiver of a right to declare a forfeiture.⁶⁶ When rent was accepted by the lessor, with knowledge on his part that the lessee was every day violating the covenants of the lease, it was held that the lessor accepting rent could not declare a forfeiture without a reasonable prior notice that further non-compliance would not be waived.⁶⁷ Not in all instances, however, will a forfeiture be waived by a receipt of rent. Thus where the amount of the ore sold and delivered could only be ascertained by an examination of the books and accounts of the lessees, the acceptance of a part of the rents or royalties by one of two joint lessors, without any knowledge that a greater sum than that tendered was due, was held not to be a waiver of the forfeiture caused by non-payment of the full amount due.⁶⁸ Where a lease required the lessee to drill a well within a certain time, or, in default of its completion within such time, pay ten dollars for every month until its completion — each payment to keep the lease in force for one month only, it was held, the well not having been completed within the required time, that on failure to make the monthly payments required, the lessor had the right to declare the lease forfeited, and that he had not waived his right to declare a forfeiture by accepting payment for the last preceding month, the

⁶⁴ *McCarty v. Mellon*, 5 Pa. Dist. Rep. 425.

⁶⁵ *Friend v. Mallory*, 52 W. Va. —; 43 S. E. Rep. 114.

⁶⁶ *Davis v. Moss*, 38 Pa. St. 346; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *Friend v. Mallory*, 52

W. Va. —; 43 S. E. Rep. 114. See *Monfort v. Lanyon Zinc Co.* (Kan.) 72 Pac. Rep. 784.

⁶⁷ *Verdolite Co. v. Richards*, 7 North Co. Rep. (Pa.) 113.

⁶⁸ *Boys v. Robinson*, *supra*.

rental for the previous months being unpaid,⁶⁹ The receipt of rent, after declaring a forfeiture — or, by executing a second lease to a third party — will not be a waiver of the power to declare such forfeiture, contained in the first lease, nor will it reinstate the first lessee in his rights under the lease.⁷⁰ But if periodical rents are to be paid, for which a liability to a forfeiture will be incurred if default be made in the payment of rent for any period; yet, notwithstanding that fact, the lessor frequently accept the rents after the time at which they should have been paid and does not declare a forfeiture, as to justify the lessee in entertaining the belief that he will not be subject to a forfeiture by the act of the lessor if he make a default, he will not, after repeatedly making default in the time of payment, followed by payment to and receipt of rent by the lessor, be subject to a forfeiture for neglect to pay rents on time thereafter, unless the lessor notifies him, before default in the particular instance, that he would insist upon a forfeiture for neglect to pay any rent falling due after giving such notice.⁷¹ Where work is done after default, in payment of rent due, without objection on the part of the lessor, there is a waiver of a right to declare a forfeiture for neglect to pay such rent within the time required.⁷² Agreeing that the time of payment may be extended is a waiver of the right to declare a forfeiture for the lack of payment.⁷³ Where the rent is payable in a certain bank by deposit therein, a deposit therein by check of the amount due, on or before the date of payment, is sufficient to prevent a forfeiture.⁷⁴ Waiver of one stipulation in a lease is not a waiver of other independent stipulations.⁷⁵ A lease re-

⁶⁹ *Duffield v. Michaels*, 97 Fed. Rep. 825.

⁷⁰ *Guffey v. Hukill*, 34 W. Va. 49; 11 S. E. Rep. 754. See *Hukill v. Guffey*, 37 W. Va. 425; 16 S. E. Rep. 544.

⁷¹ *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. Rep. 157.

⁷² *McCarthy v. Mellon*, 5 Pa. Dist. R. 425.

⁷³ *Wakefield v. Sunday Lake, etc.*,

Co., 85 Mich. 605; 49 N. W. Rep. 135.

⁷⁴ *Friend v. Mallory*, 52 W. Va. —; 43 S. E. Rep. 114. See *Monfort v. Lanyon Oil Co. (Kan.)* 72 Pac. Rep. 784.

⁷⁵ *Murray v. Heinze*, 17 Mont. 353; 42 Pac. Rep. 1057; 43 Pac. Rep. 713; *Brown v. Vandergrift*, 80 Pa. St. 142.

quired a well to be completed within two months and if not the lease to be void unless the lessee after that time should pay monthly ten dollars for each month's delay in completing a well; and it also required operations on the well to be commenced in thirty days, and if not, ten dollars extra should be paid for the second month; but work was not begun within the first month, nor a well completed within two months and eight days. At the end of the second month, the lessee paid ten dollars; and twelve days after the end of the third he tendered ten dollars more, which was refused. It was held that the first ten dollar payment could not be claimed by the lessor as a payment on account of the money to be paid extra for the second month, and that a lease given to a third party after the end of the third month, and before the well had been completed, under the claim that the first lease had been forfeited by reason of the non-payment of the sum agreed upon to be paid for delay, was void. It was also held that the payments to be made "for each month's delay in completing" the well not being made payable in advance by the terms of the lease, the lessor could not claim a forfeiture five days after the close of the third month, on the ground that the well was not then completed, and the lessee had failed to make payment for delay for the fourth month.⁷⁶

§161. Eviction of lessee.

An eviction of the lessee by the lessor will excuse him from carrying out the terms of his lease, and will also prevent a forfeiture of it on his part. The eviction may be purely constructive; such as a conveyance of vacant lots, that have been leased, by the lessor, without any reservation of the lessee's right of entry to drill for oil or gas.⁷⁷ But the entry of a lessor

⁷⁶ *Duffield v. Michaels*, 102 Fed. Rep. 820; 42 C. C. A. 649.

Where a lessor was to receive gas free for his use, the use of the gas after forfeiture incurred was held not to be a waiver of his right to declare and insist upon a forfeiture. "The land with the well upon it being the property of the appellee [lessor], he had the right to use the

gas from the well without incurring obligation under the contract to the appellant [lessee]." *American Window Glass Co. v. Williams* (Ind. App.), 66 N. E. Rep. 912.

⁷⁷ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 39 W. N. C. 544; 27 Pittsb. L. J. (N. S.) 421; 36 Atl. Rep. 216.

and the construction by him of a building on the land was held not to be such a resumption of possession as will terminate his right thereafter to demand rent, simply because he set his building where the lessee had set a stake to designate the place where the well was to be drilled, the building not otherwise preventing the development of the premises.⁷⁸

§162. Failure to operate and not for failure to develop.

Occasionally leases are met with that a failure to develop within the time given for development will not work a forfeiture; but a failure after development to operate will have that effect. Thus in a lease of a coal bank, the lease required the lessee to put the bank in good working order for the rent of the first year, but thereafter to pay a royalty on every bushel of coal taken out; and if the coal bank should remain idle by the act of the lessee, when it would yield coal, for the term of one year, it should be considered abandoned. It was held that a failure to put the coal bank in good working order the first year did not constitute an abandonment of it; the clause of forfeiture not applying to such neglect.⁷⁹

§163. Continuance of operations.

Where a lease provides a forfeiture for a neglect or failure to operate the oil or gas wells, no makeshifts of operation will prevent the forfeiture. In such an instance the operation of

⁷⁸ *Mathews v. People's Natural Gas Co.*, 179 Pa. St. 165; 27 Pittsb. L. J. (N. S.) 421; 39 W. N. C. 544; 36 Atl. Rep. 216.

⁷⁹ *Moyers v. Tiley*, 32 Pa. St. 267. See *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 1 L. R. A. 290; *Barnsdall v. Boley*, 119 Fed. Rep. 191; and *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Gadbury v. Ohio, etc., Gas Co. (Ind.)*, 67 N. E. Rep. 259; *Gadbury v. Ohio, etc., Gas Co. (Ind. App.)*, 65 N. E. Rep. 289; *American Window Glass Co. v. Wil-*

liams (Ind. App.), 66 N. E. Rep. 912.

Where a lessor of a mineral mine was to be paid only out of the net proceeds, and there were no net proceeds, although the mine was operated, it was held that the lessee was not liable on the ground that he did not continuously work the mine, not being bound to do so in the absence of a special agreement. *Caley v. Portland (Colo.)*, 71 Pac. Rep. 892. See *Colorado, etc., Co. v. Pryor*, 25 Colo. 540; 57 Pac. Rep. 51.

the well means the extraction of oil or gas from the premises; and the lessee cannot successfully claim that entries from time to time to clean and grease an engine which he had erected on the premises and used in pumping oil, or in any other legitimate way, was a continuance of mining operations, in order to prevent a forfeiture.⁸⁰ Cessure of operation for nine months was held to be such a neglect as entitled the lessor to a forfeiture. "In the rapid development and exhaustion of lands, cessation of work for nine months is a long period. Often, in far less time, the fluctuations in prices of lands and leaseholds is very great. Perhaps in no other business is prompt performance of contract so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."⁸¹

§164. Production of gas will not prevent forfeiture of an oil lease.— Reimbursement.

If the lease is for the development of the leased premises for oil, the production of gas will not prevent its forfeiture, although the gas may be a valuable product.⁸² In such an instance the lessee has no right to be reimbursed the expenses of his operations out of the proceeds of the gas obtained; for an oil and not a gas lease was contemplated by the parties when it was executed.⁸³

§165. Covenant uncertain.

To authorize a forfeiture for a failure to keep a covenant, it must not only be valid but also certain. Thus where the lessee covenanted to complete four oil wells within a year, and stip-

⁸⁰ Davis v. Moss, 38 Pa. St. 346.

⁸¹ Monroe v. Armstrong, 96 Pa. St. 307. See also Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655; Barnsdall v. Boley, 119 Fed. Rep. 191; Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373.

The law recognizes a distinction between the abandonment of operations under an oil lease and an inten-

tion to abandon or surrender the lease itself. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. Rep. 655.

See the excellent case of Coffinberry v. Sun Oil Co. (Ohio) 67 N. E. Rep. 1069.

⁸² Truby v. Palmer, 4 Cent. Rep. (Pa.) 925; 6 Atl. Rep. 74.

⁸³ Palmer v. Truby, 136 Pa. St. 556; 20 Atl. Rep. 516.

ulated if he did not that twenty-two acres should be forfeited for each well not so completed, it was held that the forfeiture clause was void for uncertainty, and could not be enforced.⁸⁴ And where the lessee of a mine covenanted to "use all economy in the conduct and management of the mining enterprise," it was held that it was too uncertain to be recognized as a condition, for the breach of which a forfeiture would be exacted.⁸⁵

§166. Re-entry.

A forfeiture may be incurred by a breach of either a covenant or a condition subsequent. If it be incurred by reason of a breach of a covenant, then the right of re-entry must be reserved to work a forfeiture.⁸⁶ In the case of a condition subsequent a right of re-entry need not be expressly reserved if the condition is expressed. But a re-entry is necessary to defeat the lease,⁸⁷ or acts that are equivalent to it — such as bringing an action in ejectment.⁸⁸ If a lessor be in possession, then a re-entry is not necessary, nor is a demand for possession. The law does not require a useless act. In the case of a gas or oil lease, where the lessor is in possession of the ground for the purposes of tillage, he has such a possession as not to require a re-entry,⁸⁹ and there must be a breach of the condition or covenant

⁸⁴ *Thomas v. Kirkbride*, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio Dec. 181.

⁸⁵ *Benaivder v. Hunt*, 79 Tex. 383; 15 S. W. Rep. 396.

⁸⁶ *Doe v. Jepson*, 3 B. and Ad. 402; 1 L. J. K. B. 154; *Jones v. Carter*, 15 M. and W. 718; *Clark v. Jones*, 1 Denio 516; *Brown v. Bragg*, 22 Ind. 122; *Den. v. Post*, 25 N. J. L. 285; *Wheeler v. Earl*, 5 Cush. 31.

⁸⁷ *Andrews v. Senter*, 32 Me. 394; *Bowen v. Bowen*, 18 Conn. 535; *Rollins v. Riley*, 44 N. H. 9; *Hamilton v. Elliott*, 5 S. and R. 375; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434.

⁸⁸ *Goodright v. Cator*, 2 Dougl. 485; *Doe v. Masters*, 2 B. and C. 490; *Osgood v. Abbott*, 58 Me. 73; *Fonda v. Sage*, 46 Barb. 109;

Stearns v. Harris, 8 Allen 597; *Melway v. Seymour*, 29 N. J. L. 321; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *Hoch v. Bass*, 133 Pa. St. 328; 19 Atl. Rep. 360. As in the usual lease of premises for gas. *Gadbury v. Ohio, etc., Gas Co.* (Ind.), 67 N. E. Rep. 259.

⁸⁹ *Guffey v. Hukill*, 34 W. Va. 49; 11 S. E. Rep. 754; 8 L. R. A. 759; *Adams v. Ore Knob Copper Co.*, 7 Fed. Rep. 634; *Allegheny Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638; affirming 21 Hun 26; *Hawkins v. Pepper*, 117 N. C. 407; 23 S. E. Rep. 434; *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926; *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452.

mentioned in the lease.⁹⁰ The right to re-enter, however, may be waived or deferred, as by an act extending the time within which a payment of the rent might be made. Even if notice to quit is given, but accompanied by an assurance that another notice will be given, the right to re-enter is not complete until such second notice has been served on the lessee.⁹¹ If the re-entry be illegal, and the lessor operate the oil wells, he must account to the lessee for the oil taken out by him at its market value, less the royalty and the actual cost of operating the wells, of permanent and necessary improvements made by him, and of money actually paid by him for labor claims against the lessee's property.⁹² If the lessee dispute all the assertions of forfeiture, but the lessor has re-entered, a preliminary injunction will be awarded and continued to restrain the lessor for continued interference with the premises;⁹³ and the lessor cannot, under such circumstances, apply for a preliminary injunction to restrain the lessee from entering upon the premises.⁹⁴

§167. **Release of premises equivalent to a re-entry.**

The execution of a second lease to a third person, after forfeiture incurred, is equivalent to a re-entry, and is as effectual for all purposes as the re-entry itself.⁹⁵ A demand for the payment of the rent due, where the forfeiture is for that reason, is not necessary before executing the second lease.⁹⁶ Not in every instance, however, will the execution of a second lease be equivalent to a re-entry nor to a declaration of a forfeiture.

⁹⁰ *Harris v. Ohio Coal Co.*, 57 Ohio St. 118; 48 N. E. Rep. 502; *McKnight v. Kreutz*, 51 Pa. St. 232. See *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236.

⁹¹ *Wakefield v. Sunday Lake, etc.*, Co., 85 Mich. 605; 49 N. W. Rep. 135.

⁹² *Wakefield v. Sunday Lake, etc.*, Co., 85 Mich. 605; 49 N. W. Rep. 135.

⁹³ *Potterie Gas Co. v. Potterie*, 153 Pa. St. 10; 25 Atl. Rep. 1107.

⁹⁴ *Potterie v. Potterie Gas Co.*, 153 Pa. St. 13; 25 Atl. Rep. 1107.

⁹⁵ *Allegheny Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638; affirming 21 Hun 26; *Huggins v. Daley*, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320; *Guffey v. Hukill*, 34 W. Va. 49; 11 S. E. Rep. 754; *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio Cir. Dec. 604.

⁹⁶ *Wolf v. Guffey*, 161 Pa. St. 276; 28 Atl. Rep. 1117; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

Thus giving a second lease subject to the first one is not a re-entry nor a declaration of a forfeiture.⁹⁷ And where the second lease is silent on the subject of the forfeiture of the first lease, oral evidence is admissible to show it was not the intention of the lessor to declare a forfeiture of such first lease.⁹⁸ And if there has been a waiver of the time or manner of payment of the rent specified in the first lease, the execution of a second lease because of a failure to make payment in the manner and at the time required by such first lease will not be sufficient to complete its forfeiture.⁹⁹ Where a lease has not only been forfeited but also abandoned by the lessee, and he has given up all hope of developing the lands, the execution of a second lease by the lessor, "subject to" the first lease, will not be construed as a recognition of the validity of such first lease.¹⁰⁰ Where a first lease had expired, and also a second one given to a third person, and the lessee under the first lease took possession with the lessor's consent, and at great expense produced oil in paying quantities, it was held that the second lessee could not maintain an action for the possession of the premises.¹⁰¹ Where the first lease requires the lessee to re-convey the premises, in case of acts of forfeiture or abandonment, the execution of a second lease will not work a forfeiture.¹⁰² Where a part of the premises were subleased by the lessee, subject to the conditions of the first lease, which the sublessee assumed, but the lessee continued to pay the rent until the last payment, when he defaulted; and thereupon the lessor executed a second lease to the sublessee for the entire premises, providing that such sublessee should stand between him and "all who may have claim to this lease," this was held not to work a forfeiture of the first lease.¹⁰³ Where a lease is executed giving the lessor an option to declare

⁹⁷ *Schaupp v. Hukill*, 34 W. Va. 375; 12 S. E. Rep. 501; *Henne v. South Penn. Oil Co.*, 52 W. Va. —; 43 S. E. Rep. 147.

⁹⁸ *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522.

⁹⁹ *Hukill v. Meyers*, 36 W. Va. 639; 15 S. E. Rep. 151.

¹⁰⁰ *Elk Fork Oil and Gas Co. v. Jennings*, 84 Fed. Rep. 839.

¹⁰¹ *Thomas v. Hukill*, 34 W. Va. 385; 12 S. E. Rep. 522.

¹⁰² *Northwestern Ohio, etc., Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio Cir. Dec. 188.

¹⁰³ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

it forfeited, under certain circumstances, which have occurred, the execution of a second lease after the occurrence of the facts authorizing a forfeiture is a sufficient declaration of the lessee that he is exercising his right of option to declare the first lease forfeited or at an end.¹⁰⁴

§168. Surrender after assignment or conveyance.—Forfeiture.

After he has made an assignment of a lease, the lessee has no power to make a surrender of it, nor to take advantage of his own default, where he would have had the right if he had remained the owner of the lease; nor can the lessor declare a forfeiture after he has conveyed away the premises.¹⁰⁵ After the lessor has transferred a lease, he has no power to accept a surrender of it, but the acceptance must be by his assignee or grantee.¹⁰⁶

§169. Forfeiture of only part of lease.

If the lease require several wells, within different periods of time to be drilled, a failure to put down all of them within the several times required will not always work a forfeiture of the entire lease. Of course, to prevent a forfeiture of the entire lease the wells actually drilled must be paying or producing wells, for dry wells will not keep a lease alive. In one case where the wells were to be completed within successive periods of time, and while two were completed the third was not, the lease was considered forfeited as to one-third of the territory covered by it.¹⁰⁷ If the number of wells to be sunk

¹⁰⁴ Huggins v. Daley, 99 Fed. Rep. 606; 40 C. C. A. 12; 48 L. R. A. 320.

A second lease that is void, because the lessee therein had notice of the first lease, will not work a forfeiture. Friend v. Mallory, 52 W. Va. —; 43 S. E. Rep. 114.

¹⁰⁵ Ohio Iron Co. v. Auburn Iron Co., 64 Minn. 404; 67 N. W. Rep. 221.

¹⁰⁶ Thompson v. Christie, 138 Pa.

St. 230; 27 W. N. C. 87; 20 Atl. Rep. 934; 11 L. R. A. 236.

¹⁰⁷ Cryan v. Ridelsperger, 7 Pa. Co. Ct. Rep. 473. See Baldwin v. Ohio Oil Co., 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50.

A stipulation that twenty-two acres shall be forfeited for every one of the required wells not sunk is void for uncertainty. Thomas v. Kirkbridge, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio C. D. 181.

on the leased premises are not stated in the lease, the lessee cannot escape by sinking a single producing well, or even two or three, if not sufficient to develop and secure all the oil under the surface. He must sink enough wells to secure all the oil, especially if it is probably escaping to adjoining premises in which he is interested; and if he do not, he will forfeit all that part of the premises not sufficiently occupied with wells.¹⁰⁸ By a number of leases, similar in terms, obtained from several persons, a lessee acquired the exclusive right in a large territory to drill and operate for oil and gas. He agreed to give each lessee a certain portion of the oil obtained, and pay a certain annual sum for each gas well. On pain of forfeiture he was required to put down one test well within a year from the date of the leases. The leases were to run ten years. The putting down of one test well within a year was not considered sufficient to vest in him an absolute right to the territory covered by all the leases, it was said, but he must proceed and develop within a reasonable time after sinking such test well at least one well on each of the leased premises, and a failure to do so as to any one lease was an abandonment of the premises described in it. In passing on the case the court used the following language:

“With the conclusion reached by the lessors that Johnston (the lessee) had abandoned the leases, we fully concur, and we further find from the evidence that, as to these particular leases, it was his intention to do so. Both public and private interests require that such facts as are disclosed by the testimony in these cases should be held by a court of equity to constitute abandonment of the leases involved, because of non-development. It should be kept in mind that Johnston in all these leases was the party who was to take initiative. He was the actor who was to commence development and make the search on all the

¹⁰⁸ Colgan v. Forest Oil Co., 30 Pittsb. L. J. (N. S.) 68. In this case twenty days were given in which to sink the required wells, and if not so done, the unoccupied part of the premises were to be forfeited. Same rule in Young v. Van-

dergrift, 30 Pittsb. L. J. (N. S.) 39. But both cases were reversed. Young v. Forest Oil Co., 194 Pa. St. 243; 45 Atl. Rep. 121; Colgan v. Forest Oil Co., 194 Pa. St. 234; 45 Atl. Rep. 119; Coffinberry v. Sun Oil Co. (Ohio) 67 N. E. Rep. 1089.

land described in them. This he, for reasons of his own, so far as these particular leases were concerned, failed to do from 1889 to 1897. He now asks a court of equity, after such unreasonable delay on his part, and gross neglect of his implied duty, and after there has been a material change in the situation, brought about by the efforts of others in interest, to decree that he is entitled to the possession of the property he had abandoned. To so decree would be not only unconscionable, but would retard the development of the country, and at the same time it would reward those who have been negligent, and punish those who have been prompt, in the discharge of their contract duties.

“After Johnston caused the Smith well to be drilled it was his privilege to determine — using for that purpose the information secured by that well — in what direction and in what particular tracts of land he would make his subsequent developments, and, if, in so doing, his conduct and his declarations resulted in the abandonment of the leases located in other sections, for any misfortune occasioned to him thereby he must hold his own judgment responsible and not the judgment of the court. It was evidently not the intention of Johnston, when the numerous leases were executed to him in 1889, amounting in the aggregate to over twenty thousand acres, to drill wells upon each and every separate tract, but he intended, using each separate search as an indicator, to locate, if possible, the points where oil and gas could be found, and, having done that, to abandon those leases that previous development had shown to be located in unprofitable localities. That he, and those operating under him, regarded the leases in the Elk Fork region of Tyler County as worthless, in an oil-producing sense, is, we think, fully shown by the testimony, and such conclusion on his and their part is but another illustration of the uncertainty and surprises that come to those engaged in the development of oil territory.”

An important feature of the case is treated as follows:

“The fact that all the Paova leases contained the following clause, ‘subject to the Johnston lease,’ must be considered in connection with the circumstances surrounding the parties when

they executed the same. In our judgment, the lessors intended by these words to incorporate into their contracts the fact that they had advised their lessee that the land had been theretofore leased to Johnston, and that he was to take it subject to the old lease, with the understanding that if the Johnston lease was valid, he took nothing by the new grant, but that if it was invalid, the conveyance was then to stand as a contract between the parties. To hold, as insisted upon by counsel for defendants, that said words were intended as an admission of the validity of the Johnston leases, would be to hold that the parties to the new leases, admitted by them that the lessor had nothing to grant, and that consequently there was nothing for the lessee to take. Clearly does it appear that such was neither the belief nor the intention of the parties. Under similar circumstances, learned counsel would doubtless have employed other and more apt language, but still we think the words used are sufficient to enable the court to read the contract as we have construed it, and thereby get not only near to, but exactly at, the intention of the parties."¹⁰⁰

§170. Partial development — abandonment.

A partial development may prevent a forfeiture for a failure to develop, even as to the entire premises. Thus where a lease was for twenty years; two wells to be drilled, the first within the first year, and the second in two years; and if the second produced sufficient gas to be capable of use, the consideration in full for such well to be a certain rental; if there was delay in the completion of the two wells, the annual rentals were to be paid and accepted in full consideration for the delay; and the lessee drilled the first well, but not the second, obtained gas in sufficient quantity to use it; for more than two years paid the rental, when the well and casing were plugged, and the "rig" taken down; and the lessee never drilled the second well, nor paid the lessor anything for a failure to do so, it was held

¹⁰⁰ Elk Fork Oil and Gas Co. v. Jennings, 84 Fed. Rep. 839.

that these facts did not show an abandonment of the lease.¹¹⁰ But where the lessee was to complete a well within six months, or thereafter within sixty days remove all machinery and buildings, in which event the lease was to be null and void, unless further prosecuted after the first well was drilled — it was held, after the first well was drilled, that the lease was avoided by a failure to further operate for mining purposes for a period of several years.¹¹¹ A lessee of seventy-four acres, leased on a royalty for a term of five years, and as much longer “as oil or gas was found in paying quantities,” by the terms of the lease was required to complete a well thereon within three months. He completed this well on time, but drilled no others, and made no serious effort to do so during the five years, although the lessor repeatedly urged him to do so. The well drilled was a small producer, not paying the expense of operating it. After the expiration of the term of five years, the lessee applied to a court of equity to enforce the lease against the lessor and those to whom a lease had been given after the expiration of the five years; but the court refused to do so, basing its refusal on the ground that the plaintiff had not complied with the implied condition of the lease, which required him to develop the property in good faith.¹¹²

§171. Lessee draining leased premises by wells on adjoining territory.

A lessee cannot hold the leased premises and drain them by sinking oil wells on adjoining premises; and if he persist in

¹¹⁰ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. St. 249; 41 Atl. Rep. 739. See *Monfort v. Lanyon Zinc Co.* (Kan.) 72 Pac. Rep. 783.

Where no work was commenced, it was held there was no abandonment of a hundred years' lease to mine coal, even though the lessee had neither paid rent nor searched for coal. *Plummer v. Hillside Coal and Iron Co.*, 160 Pa. St. 483; 34 W. N. C. 366; 28 Atl. Rep. 853.

¹¹¹ *Heintz v. Shortt*, 149 Pa. St. 286; 24 Atl. Rep. 316.

The law recognizes a distinction between the abandonment of operation under an oil lease and an intention to abandon or surrender the lease itself. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

¹¹² *Barnsdall v. Boley*, 119 Fed. Rep. 191.

such conduct he will forfeit his lease. In an instance of this character, or at least where there was danger that the leased premises would be drained of its oil by wells operated on adjoining premises by the lessee, it was held to be the duty of the lessee to open as many wells on the leased premises as was necessary to secure the common advantage of the lessor and himself, and to prevent the loss of oil under the lessor's land by drainage into the adjoining wells; in default of which the lease might be declared forfeited.¹¹³

§172. Lessee draining away oil by sinking wells on adjoining premises.

But if the lessee has complied with the terms of his lease, the lessor cannot declare a forfeiture on the ground that such lessee has leased adjoining territory and is draining his, the lessor's, premises through the wells upon such territory, although the conduct of the lessee may inflict upon him great damages.¹¹⁴

§173. Inability to complete work.—Inclement weather.

The lessee cannot always urge successfully as an excuse that the weather was so inclement that he could not drill the wells within the time fixed by the lease, or operate them continuously after they were drilled. In order to do this he should have inserted in the lease a clause preventing a forfeiture because of that fact.¹¹⁵ In the first case cited the lease required one well to be completed within five months, a second within one year, and a third within two years. The first and second wells were completed on time; but the third was not, although before the expiration of the two years the lessee had placed timber upon the leased premises for a complete carpenter's rig, but was un-

¹¹³ *Kleppner v. Lemon*, 176 Pa. St. 502; 38 W. N. C. 388; 35 Atl. Rep. 109; *Coffinberry v. Sun Oil Co.* (Ohio) 67 N. E. Rep. 1069.

¹¹⁴ *Ohio Oil Co. v. Harris*, 1 Ohio Dec. 157; same case 1 Ohio N. P. 132. See *Parish Fork Oil Co. v.*

Bridgewater Oil Co., 51 W. Va. 583; 42 S. E. Rep. 655.

¹¹⁵ *Cryan v. Ridelsperger*, 7 Pa. Cir. Ct. Rep. 473; *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19.

able to secure workmen to build the rig. The failure to secure workmen was held to be no excuse, and on trial the lease was declared forfeited. This was a *nisi prius* decision. But in the State where this decision was given the Supreme Court held that if the lessee, on the last day of the period allowed, in good faith entered on the premises and began operations preparatory to drilling a well, but was prevented by the lessor from proceeding farther (it being impossible to begin the well on time), there was no forfeiture;¹¹⁶ and in another State where the lessee was not able to complete the well on time, because the excessively muddy condition of the roads rendered it impossible to get the necessary machinery on the premises in time, it was held that there was no forfeiture.¹¹⁷ Where an excuse was set up by lessees as a defense that they were working other leases and were "approaching these lands as fast as they could, and that they could not work these lands for want of railroad facilities," it was held that this was an insufficient excuse. "Counsel's contention is," said the court, "that the enterprise could not be abandoned unless it had been begun. They insist that the meaning of the contract is that the lease continues to subsist for the full term of twenty years, though not a single thing is done under it on the land, and even though no intention exists on the part of the lessees to do anything under the terms thereof. We think it quite clear that such was not the intent of the parties as gathered from the lease itself. No reason is perceived why it would not be as injurious to the lessors to fail to commence operating the mines and quarries for twelve months as to cease operating them, after beginning, for a period of twelve months."¹¹⁸

¹¹⁶ Henderson v. Ferrell, 183 Pa. St. 547; 38 Atl. Rep. 1018.

¹¹⁷ Fleming Oil and Gas Co. v. South Penn. Oil Co., 37 W. Va. 645; 17 S. E. Rep. 203. See Forney v. Ward (Tex. Civ. App.), 62 S. W. Rep. 108; Lane v. Gordon, 18 N. Y. App. Div. 438; 46 N. Y. Supp. 57.

¹¹⁸ Woodard v. Mitchell, 140 Ind. 406; 39 N. E. Rep. 437.

See where a failure to begin for five and a half years to develop a mine was held not to work a forfeiture. Baumgardner v. Browning, 12 Ohio Cir. Ct. Rep. 73; 5 Ohio Cir. Dec. 394.

§174. Mortgage of leasehold may work a forfeiture.

A lease may prohibit the lessee placing a mortgage on the leasehold under the penalty of its forfeiture if he do so. And if the lease prohibit, under the penalty of forfeiture, a transfer of it by the lessee, the mortgaging of the leasehold by such lessee, followed by a sale thereunder, will have the same effect as a transfer of the lease. Where in such an instance, the leasehold was sold under the mortgage at a constable's sale, it was said: "The mortgage upon the leasehold through which he claims, fell with the forfeiture. The creation of the mortgage was prohibited in substance by the lease, and was a ground of forfeiture. The lessee, having no right to assign his lease, could not do so indirectly by mortgaging it. As against the landlord the mortgage was a nullity, and it cannot be successfully set up as against the title acquired through the forfeiture and constable's sale."¹¹⁹

§175. When work must be completed.

Not only must the work be commenced within the time specified, but it must be completed within the time limited, in order to avoid a forfeiture. But if the work has been completed in time, a forfeiture will not be declared simply because it has not been completed in the order specified in the lease. Thus where two wells were to be completed the first six months of the second year, and two more the second six months of such year, a completion of four wells within that year was considered to be such a substantial compliance with the lease as to defeat a forfeiture.¹²⁰ Where the lease required a well to be completed within three months, and all wells within eighteen months, it was held that the court would not direct how the lessee should work the premises, or how many wells should be sunk; and that the lessor could insist on a forfeiture simply because the lessee had not been sufficiently active in developing the property.¹²¹

¹¹⁹ *Becker v. Werner*, 98 Pa. St. 555.

¹²⁰ *Thomas v. Kirkbridge*, 15 Ohio Cir. Ct. Rep. 294; 8 Ohio Dec. 181.

¹²¹ *Baldwin v. Ohio Oil Co.*, 13 Ohio Cir. Ct. Rep. 519; 7 Ohio Dec. 50.

Where a well was to be commenced within sixty days and completed within five months, a failure to complete a well within five months that was begun within the sixty days was held to work a forfeiture of the lease.¹²²

§176. Excavating for oil means bringing it to the surface.

Where a lease provides for the diligent prosecution of the undertaking to success or abandonment and for a forfeiture if oil be not excavated in paying quantities on or before a given date, the oil must be raised to the surface, and merely finding it in the earth within the time given will not prevent a forfeiture, if it be not pumped or rise to the surface of the earth.¹²³

§177. Failure to pay royalty or report them.

A mere failure to pay royalties due under the lease will not give the lessor sufficient ground to declare a forfeiture, unless by the express terms of the lease he is given that right and power.¹²⁴ But a failure to either develop the leased premises or pay rent, within the time named, may be sufficient evidence from which an inference of abandonment may be drawn.¹²⁵ If the lessor is to receive a certain portion of "all of the profits" realized from oil or gas found on the premises, that means the net profits; and he cannot declare a forfeiture for neglect of the lessee to account at a time when the proper expenses of the lease exceed the receipts.¹²⁶ A lease provided for a yearly rental of

¹²² *Cleminger v. Baden Gas Co.*, 159 Pa. St. 16; 33 W. N. C. 480; 28 Atl. Rep. 293.

¹²³ *Kennedy v. Crawford*, 138 Pa. St. 561; 21 Atl. Rep. 19. See *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

¹²⁴ *Wakefield v. Sunday Lake, etc., Co.*, 85 Mich. 605; 49 N. W. Rep. 135; *Ammons v. South Penn. Oil Co.*, 47 W. Va. 610; 35 S. E. Rep. 1004. See *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350.

¹²⁵ *Marshall v. Forest Oil Co.*, 198

Pa. St. 83; 47 Atl. Rep. 927; *Barnhart v. Lockwood*, 152 Pa. St. 82; 25 Atl. Rep. 237.

¹²⁶ *Potterie Gas Co. v. Potterie*, 179 Pa. St. 68; 36 Atl. Rep. 232.

In such an instance, a stipulation that the lessee should "use all economy in the conduct and management of the mining enterprise," is too uncertain to be recognized as a condition, for the breach of which a forfeiture may be enacted. *Benavides v. Hunt*, 79 Tex. 383; 15 S. W. Rep. 396.

four hundred dollars, payable quarterly, the amount to be deducted from royalties when in excess of that sum. The royalties were payable quarterly on ore as sold and delivered. The lease also provided that if payments were not made at the time specified, the lease should be void. It was held that a failure to fully pay all royalties on ore sold and delivered at the end of each quarter year worked a forfeiture of the lease.¹²⁷

§178. Payment of rent will not prevent forfeiture for neglect to develop.

Payment of the rent will not always prevent a forfeiture for a neglect or failure to develop, or for a neglect to operate after development. Thus where the lease was for two years, and as much longer as oil was found in paying quantities; and it provided for the commencement of a well in thirty days, and its completion in ninety days, or, in default, the payment of an annual rental of sixty dollars from the time named for the completion of the well until it should in fact be completed; it was held that the lessee could not keep the lease alive after the two year limit by the payment of an annual rental merely.¹²⁸ To hold that he could do so, was considered by the court to convert the lease into a perpetual option to drill for oil and gas, when the apparent purpose of the lessor was to compel the development of his land within the period of three years.¹²⁹ If a lease provide that it shall be forfeited for a neglect to pay any of

¹²⁷ *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813.

The amount of deposit made by a tenant to secure the observance of the conditions of a lease, cannot be applied to the payment of rent, so as to avoid a forfeiture, otherwise than in conformity to the conditions of the deposit. *Rosenquist v. Canary*, 15 N. Y. Misc. 148; 36 N. Y. Supp. 979; 72 N. Y. St. Rep. 422.

¹²⁸ *Western Pennsylvania Gas Co. v. George*, 161 Pa. St. 47; 28 Atl.

Rep. 1004; *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813; *American Window Glass Co. v. Williams* (Ind. App.), 66 N. E. Rep. 912.

¹²⁹ The Appellate Court cited *Hollingsworth v. Fry*, 4 Dall. 345, and *Packer v. Noble*, 103 Pa. St. 188. See *National Oil, etc., Co. v. Teel* (Tex. Civ. App), 67 S. W. Rep. 545; *Gadbury v. Ohio, etc., Gas Co.* (Ind.), 67 N. E. Rep. 259; *Gadbury v. Ohio, etc., Gas Co.* (Ind. App.), 65 N. E. Rep. 289.

the payments required to be made, a whole payment is meant and not a balance on a running account.¹³⁰

§179. Must pay rent although no oil on premises.

If the lease require the lessee to complete an oil well within a certain time, or thereafter pay a certain sum annually until a well is completed, it is no excuse for not drilling the well that the premises were worthless for oil, and for that reason a well was never completed. In passing on the case, the court said:

“ I do not think, however, that the fact of there being no oil or gas on the land, no matter how soon found out, could avail the defendant. The lessors were entitled to insist that this fact should be made manifest in the very manner agreed upon, or to demand the sum stipulated to be paid for delay. The covenant on this subject is absolute and unqualified, and provides for the doing of nothing that is illegal and improbable. If a clear, positive covenant, like the one before us, to do a lawful thing or pay a certain sum of money for not doing it, can be evaded by showing that the performance of the act did not benefit the covenantee, it is hard to tell where we could properly stop in applying the rule. We might presently reach a point where an action for liquidated damages for breach of an agreement not to engage in a certain business within designated limits, might be defeated by proving that everyone conducting the same business in the neighborhood had been losing money, and, for reasons shown, would probably continue to do so. . . . That the contract may have proved a losing one to the lessee or his assignee, the defendant, is neither here nor there. To quote the popular saying, ‘ a contract is a contract ’ and no sufficient reason appears why the one under consideration should not be enforced.”¹³¹

¹³⁰ Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731.

¹³¹ Springer v. National Gas Co., 145 Pa. St. 430; 22 Atl. Rep. 986.

§180. Lessee must pay past rents.— Damages.

A forfeiture declared by the lessor does not release the lessee from the payment of rents or royalties or other sums that had matured at the time of the declaration of forfeiture. And the same is true in case of a surrender. "The lessees had the right to surrender the lease at any time, but such surrender was not a payment of what they then owed." In the case from which this quotation has just been made the lease provided that the lessee should commence a well within one month from the date of the lease, or in lieu thereof, pay the lessor two dollars per day until it was commenced, or surrender the lease. It was held that upon surrender of the lease that the payments contemplated were to be made up to the time of the surrender; (although not as a condition of the surrender), and, when so made, they should be in full satisfaction for any damages by reason of the failure of the lessee to perform the conditions of the lease.¹³²

§181. Lessor consenting to abandonment.

If the lessor consent to the abandonment by the lessee, he cannot thereafter insist that the lessee must pay the penalty or the rent stipulated for in the lease. Such was decided to be the case where a test well was drilled, which proved to be a dry hole, yielding neither gas nor oil, the lessee openly and publicly removing the machinery from the premises, abandoning all further operations on the premises; and the lessor, knowing that the well was a dry hole and that the premises had been abandoned, making no claim upon the lessor for any sum of money due under the lease for several years, the lessee waiving a written notice of forfeiture, and the lessor subsequently granting to another party an option to buy all the coal underlying the surface of the premises.¹³³

¹³² *Bettman v. Shadle*, 22 Ind. App. 542; 53 N. E. Rep. 662. See also *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio Wkly. L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62.

¹³³ *May v. Hazelwood Oil Co.*, 152 Pa. St. 518; 25 Atl. Rep. 565. See *Stage v. Boyer*, 183 Pa. St. 560; 38 Atl. Rep. 1035.

§182. Estoppel of lessor.

A lessor by his conduct may estop himself to declare a forfeiture. Such an instance is where a lessee is given to understand, before forfeiture incurred, that if a particular covenant in the lease is not performed on time there will be no forfeiture declared or enforced. Perhaps this might be put on the ground of waiver, although that term more properly applies to instances where the forfeiture has been incurred before the acts of waiver have taken place, yet preceding the declaration of forfeiture. Any act of the lessor that lulls the activity of the lessee, and upon which he has a right to rely, that takes place before a forfeiture is incurred, and which would not have been permitted by the lessee without such act of the lessor, may well be deemed to estop such lessor from insisting upon a forfeiture for a non-performance of the particular covenant of which lack of performance is complained and insisted upon by the lessor as cause for a forfeiture. It would be inequitable to permit a forfeiture under such circumstances.¹³⁴ But an estoppel to assert one breach cannot be made to apply to another; as, for instance, if there is an estoppel to insist upon a forfeiture to commence a well within sixty days, it cannot be used to prevent a forfeiture for having failed to complete the well within five months.¹³⁵ An estoppel may also arise where the lessor, after forfeiture incurred, permits the lessee to expend considerable, or at least large, sums of money in developing the premises, knowing, or at least having good reasons to believe, that the lessee does not think a forfeiture will be enforced.¹³⁶ This is particularly true of the payment of rent on the precise day when due, which in point of time is not always regarded as of the essence of the contract. "There is a wide distinction even in equity between forfeiture for failure of punctual payment of money," said the court in one case, "where time is of the essence of the contract and where it is not. If parties choose to stipulate for matters as essential, it is not for courts to say they are not so,

¹³⁴ *Steiner v. Marks*, 172 Pa. St. 400; 33 Atl. Rep. 695.

159 Pa. St. 16; 28 Atl. Rep. 293.

¹³⁶ *Duffield v. Michaels*, 102 Fed.

¹³⁵ *Cleminger v. Baden Gas Co.*, Rep. 20.

but in the absence of a clear agreement for materiality, courts will look into the nature of the transaction and be governed by the real bearing of the facts upon the intentions and rights of the parties.”¹³⁷ If the lessor has prevented the lessee completing a well in time, he is estopped to declare a forfeiture for a failure to keep the covenant of the lease in that respect.¹³⁸

§183. Demand for compliance with lease.

If the lessee has made default, unless the lease provide otherwise, the lessor is not required to make a demand on him to comply with the lease, especially if he, and not the lessee, is in possession.¹³⁹ This is especially true if the lease authorizes in terms the lessor to re-enter without demand or notice.¹⁴⁰

§184. Abandonment a question of intention.

Abandonment of a lease is a question of intention, and is to be determined only on an investigation of the facts. Mere lapse of time may not be sufficient to determine that question, but it may be “aided and strengthened by the acts and declarations of the tenant evincing the intention permanently to abandon.”¹⁴¹

§185. Forfeiture a question for jury.

Usually whether or not there has been a forfeiture or abandonment is a question for the jury. Thus a lessee was to commence drilling a well within ninety days from the date of the lease, and “prosecute said drilling with due diligence to success or abandonment”; and it was provided that if oil or gas be not pumped or excavated in paying quantities on or before a certain date, then the lease was to be null and void; and the lessee began the work on time and prosecuted it contin-

¹³⁷ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. See *Northwestern Ohio, etc., Gas Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio Cir. Dec. 188.

¹³⁸ *Stahl v. Van Vleck*, 53 Ohio St. 136; 41 N. E. Rep. 35.

¹³⁹ *Maxwell v. Todd*, 112 N. C. 677; 16 S. E. Rep. 926.

¹⁴⁰ *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452.

¹⁴¹ *Karns v. Tanner*, 66 Pa. St. 297; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; 42 S. E. Rep. 655.

uously until five months after the date in the lease set for its forfeiture, when he withdrew the casing and left the premises for five months longer. He claimed that he had found oil in paying quantities, but admitted he had never pumped any from the well. In an action involving the validity of the lease, it was held that the lessee had no discretion to delay operations indefinitely, provided he produced oil or gas in paying quantities by the date fixed, but he was bound to exercise diligence during the whole period; and it was a question for the jury whether a forfeit had been incurred because of a lack of due diligence.¹⁴² A lease of certain premises provided that if no well had been begun and prosecuted with due diligence within four months it should be void. It was held not error to refuse to instruct the jury that if the lessee, before the termination of the lease, hauled lumber on the premises with the purpose to begin the well, such act was a beginning of the well within the terms of the lease; for the reason as the lessee had hauled lumber on the premises the day before the lease expired, it was not for the court to determine the question of forfeiture as a matter of law, but the question was one for the jury to decide, in connection with the testimony as to the general understanding among persons engaged in boring wells as to when a well was begun.¹⁴³ So where, under a similar lease, the lessee, within the time drilling on the well was to be begun, commenced the construction of necessary machinery on the premises, and was engaged in seeking for contractors to do the work, the question whether the lessee had used due diligence in constructing the well was considered one for the jury.¹⁴⁴ Whether there has been an abandonment by the lessee is also a question for the jury.¹⁴⁵ If there be no dispute as

¹⁴² *Kennedy v. Crawford*, 138 Pa. St. 561; 27 W. N. C. 306; 21 Atl. Rep. 19; *Rynd v. Rynd Farm Oil Co.*, 63 Pa. St. 397; *Karns v. Tanner*, 66 Pa. St. 297; *Wesling v. Kroll*, 78 Wis. 636; 47 N. W. Rep. 943; *Nelson v. Eachel*, 158 Pa. St. 372; 33 W. N. C. 281; 27 Atl. Rep. 1103.

¹⁴³ *Forney v. Ward* (Tex. Civ.

App.), 62 S. W. Rep. 108. See *Fleming Oil and Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645; 17 S. E. Rep. 203.

¹⁴⁴ *Lane v. Gordon*, 18 N. Y. App. Div. 438; 46 N. Y. Supp. 57; *Heinouer v. Jones*, 159 Pa. St. 228; 28 Atl. Rep. 228.

¹⁴⁵ *Bartley v. Phillips*, 165 Pa. St. 325; 30 Atl. Rep. 842.

to the acts done, and none with reference to the inference to be drawn from them, it is error to submit the question of forfeiture to the jury.¹⁴⁶

§186. Suit to cancel lease for non-development of territory.

A court of equity has full power to entertain a suit to cancel a lease for neglect or refusal of the lessee to develop the premises leased. Thus where the lease was for twenty years, or so long as oil and gas should be found in paying quantities; and seven years had elapsed since the time fixed for drilling a test well, it was held that a court of equity would cancel the lease, the presumption being that the lessee had abandoned it.¹⁴⁷ But if the lessor is in actual possession, and the terms of the lease are such as to render the lease void if any particular covenant is not kept, then the lessor cannot maintain an action in equity to cancel the lease, although he may sue in assumpsit for arrears of royalty, or, possibly in ejectment.¹⁴⁸ Unusual delay will work a forfeiture of the right to maintain a suit to cancel a lease, where the ground of forfeiture is a failure to pay royalties.¹⁴⁹ In an action to cancel the lease for non-development or failure to carry on mining operations, it is proper to show that the lessee had failed to furnish periodical statements of the oil produced, as required by the contract; that he is insolvent, and creditors are seizing the mining apparatus, and that the property is likely to be destroyed or injured by discontented and unpaid

¹⁴⁶ *McKnight v. Kreutz*, 51 Pa. St. 232.

A suit to quiet title lies after forfeiture incurred. *American Window Glass Co. v. Williams* (Ind. App.), 66 N. E. Rep. 912; *Gadbury v. Ohio, etc., Gas Co.* (Ind.), 67 N. E. Rep. 259; *Gadbury v. Ohio, etc., Gas Co.* (Ind. App.), 65 N. E. Rep. 289.

¹⁴⁷ *Crawford v. Ritchey*, 43 W. Va. 252; 27 S. E. Rep. 220; *Bettman v. Shadle*, 22 Ind. App. 542; 53 N. E. Rep. 662; *Cowan v. Bradford Iron Co.*, 83 Va. 547; 3 S. E. Rep. 120; *Southern Oil Co. v. Wilson*, 22

Tex. Civ. App. 534; 56 S. W. Rep. 429; *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350; *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Parish Fork Oil Co. v. Bridgewater Oil Co.*, 51 W. Va. 583; 42 S. E. Rep. 655; *Gadbury v. Ohio, etc., Gas Co.* (Ind.), 67 N. E. Rep. 259.

¹⁴⁸ *Hoch v. Bass*, 133 Pa. St. 328; 19 Atl. Rep. 360.

¹⁴⁹ *Drake v. Laccoe*, 157 Pa. St. 17; 27 Atl. Rep. 538. The delay was twelve years. See *Core v. N. Y., etc., Co.*, 52 W. Va. —; 43 S. E. Rep. 128.

workmen.¹⁵⁰ Ejectment lies at the instance of the lessor or his grantee to recover possession, without making any re-entry, and without demanding the rent or royalties due and unpaid.¹⁵¹ So will a suit to quiet title.¹⁵² The lessee cannot stay the forfeiture proceedings, at least after notice of forfeiture given, by an appeal to a provision in the lease whereby certain questions were to be submitted to arbitration.¹⁵³ If the premises in part have been developed, the suit cannot be maintained for the forfeiture of the entire lease, but must be for damages.¹⁵⁴ Where the time of the payment of the rental is not a part of the essence of the lease, equity may excuse default in its payment, and will not declare a forfeiture and cancellation of the lease, if it would be inequitable so to do.¹⁵⁵

§187. Relief from forfeiture.

Equity has power to grant relief from a forfeiture incurred where the lessee has not in fact been guilty of any act of neglect, although he has not carried out the provisions of the lease to their full extent.¹⁵⁶ Such was the case of the failure to deliver the lessor his share of oil where there was such an extraordinary and unexpected flow as to make a delivery impracticable. If it would be unconscionable to allow a forfeiture to be enforced, a court of equity will grant relief against such forfeiture.¹⁵⁷ If a forfeiture for non-payment of money, or for failure to perform any other act, will admit of accurate and full compensation, and is provided as a mere penalty with a view to enforce

¹⁵⁰ *Sunday Lake Mining Co. v. Wakefield*, 72 Wis. 204; 39 N. W. Rep. 136. In this case it was also held that a court having jurisdiction of the parties could grant relief from a forfeiture, though the mines were situated in another State, and that the court could restore the possession of them.

¹⁵¹ *Boys v. Robinson* (N. J. L.), 38 Atl. Rep. 813.

¹⁵² *Island Coal Co. v. Combs*, 152 Ind. 379; 53 N. E. Rep. 452.

¹⁵³ *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News (Pa.) 169.

¹⁵⁴ *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662. Suit to cancel so much of the lease as pertains to the undeveloped premises will lie. *Coffinberry v. Sun Oil Co.* (Ohio) 67 N. E. Rep. 1069.

¹⁵⁵ *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350.

¹⁵⁶ *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350.

¹⁵⁷ *Thompson v. Christie*, 138 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236.

a performance of another and principal obligation, a court of equity will grant relief against it, and will not permit it to be used for a different and inequitable purpose. Thus a lease provided for rent payable for delay in drilling a well; but as no time was specified for the payment of rent, it fell due by operation of law at the end of each year. For several years, instead of drilling a well, the lessee paid the rent. He then began drilling a well, and at great expense obtained oil in paying quantities. By oversight the lessee failed to pay an annual rent when it fell due; and six days after default the lessor notified him to remove his machinery, and the next day declared a forfeiture. During these six days the lessee spent considerable money on the leased premises in their development. The court considered the lessee's action lacked that promptness that was essential to declare a forfeiture, that his action was unconscionable, and that a forfeiture could not be enforced.¹⁵⁸ If the principal thing is to sink a well, then relief in equity will not be given upon the tender of the periodical and unpaid rental, where neglect to sink the well cannot be compensated for in damages.¹⁵⁹ Relief can be afforded by a court having jurisdiction of the parties, although the premises lie in another State; and the court can restore possession of them to the lessee.¹⁶⁰ If the time of payment of the rental is not in express terms or necessary implication made the essence of the lease, equity may excuse a default in payment, and will not declare a forfeiture and cancellation of it in a case where it would be inequitable and unconscionable.¹⁶¹

§188. Time to avoid forfeiture.

Usually courts will give some time after the date of forfeiture fixed in the lease to perform the covenant on which the forfeit-

¹⁵⁸ *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. Such would be the case where the lessor entered for a failure to pay rent on time, when the payment was hindered by his acts. *Young v. Ellis*, 91 Va. 297; 21 Atl. Rep. 480.

¹⁵⁹ *Hukill v. Guffey*, 37 W. Va. 425; 16 S. E. Rep. 544.

¹⁶⁰ *Sunday Lake Mining Co. v. Wakefield*, 72 Wis. 204; 39 N. W. Rep. 136.

¹⁶¹ *Edwards v. Iola Gas Co.*, 65 Kan. —; 69 Pac. Rep. 350.

ure depends. Thus where a lease provided for the drilling of wells within a stated time, or payment of a yearly sum in advance, it was held that the lessor could not declare a forfeiture immediately at the termination of a year for which such payment had been made in, because no wells had been drilled, even though he had the right to refuse payment for a succeeding year; for the lessee had a right to a reasonable time after the expiration of the year paid for to drill a well and operate the premises.¹⁶² So, in a case of limitation. Thus where a lease was given for five years and as much longer as gas and oil was found in paying quantities, on the failure of a well which had produced gas in paying quantities for a number of years, and for which the rental had been promptly paid, it was held that the lessee was entitled to a reasonable time to drill at other locations to find gas or oil in paying quantities, and during such time and for such purposes the lease continued in force.¹⁶³

§189. Lessee cannot recover premises after forfeiture.

If the lessee has been ousted for a failure to keep the covenants of the lease, he cannot recover possession.¹⁶⁴ A part performance will not enable him to recover possession.¹⁶⁵

§190. Reimbursement for expenses.

A lessee who has forfeited his lease has no right to be reimbursed for his expenses disbursed in attempting to develop the land.¹⁶⁶ And if it is an oil lease, but gas is found, the lessee has no equity to be reimbursed for the expense of drilling the well, out of the fund produced by the sale of the gas.¹⁶⁷

¹⁶² *Northwestern Natural Gas Co. v. Browning*, 15 Ohio Cir. Ct. Rep. 84; 8 Ohio C. D. 188.

¹⁶³ *Blair v. Northwestern, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. 620.

¹⁶⁴ *Oliver v. Goetz*, 125 Mo. 370; 28 S. W. Rep. 441.

¹⁶⁵ *Kreutz v. McKnight*, 53 Pa. St. 319.

¹⁶⁶ *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

¹⁶⁷ *Allen v. Palmer*, 136 Pa. St. 556; 26 W. N. C. 514; 20 Atl. Rep. 516; *Palmer v. Truby*, 136 Pa. St. 556; 20 Atl. Rep. 516.

§191. Removal of fixtures and machinery.

When the lease is declared forfeited by the lessor, the lessee has a right to remove the fixtures without the right being reserved in the lease.¹⁶⁸ And if the right to remove the buildings, fixtures and machinery be reserved in the lease, the right to do so cannot be disputed. Thus where the lease expressly provided that the lessee should have such right of removal "unless all right thereto" had been "forfeited by a forfeiture" of the lease, or forfeiture for non-payment of the royalty, it was held not to deprive the lessees of the right to remove the buildings and other personal property which he had put on the lease, within a reasonable time.¹⁶⁹ The right of the lessee under an express reservation of the right to remove buildings and machinery, has a right to do so, irrespective of any controversy as to whether or not there is a legal right to abandon the lease by reason of an alleged failure on his part to complete the work of development.¹⁷⁰ If the lessee is refused the privilege of removing his buildings and machinery, his remedy as to such buildings and machinery is an action for conversion and not an action of ejectment.¹⁷¹ All fixtures, buildings and machinery must be removed within a reasonable time after notice of forfeiture given him by the lessor,¹⁷² or else they will be deemed abandoned, and the lessor may take possession of them for his own benefit. The lessee, where he has not drilled a well that yields oil or gas in paying quantities, and for that reason has abandoned it, has a right to draw and remove the tubing, casing, and drive pipe from the well at any time prior to the expiration of his lease. These instruments are regarded as trade fixtures, and are not governed by law pertaining to leases for agricultural pursuits.¹⁷³

¹⁶⁸ Cassell v. Crothers, 193 Pa. St. 359; 44 Atl. Rep. 446. See Shellar v. Shivers, 171 Pa. St. 569.

¹⁶⁹ Mickle v. Douglas, 75 Ia. 78; 39 N. W. Rep. 198.

¹⁷⁰ Patterson v. Hausbeck, 8 Pa. Super. Ct. Rep. 36.

¹⁷¹ Cassell v. Crothers, *supra*.

¹⁷² Mickle v. Douglas, *supra*.

¹⁷³ Siler v. Globe Window Glass Co., 21 Ohio Cir. Ct. Rep. 284; 11 Ohio C. D. 784.

§192. Damages instead of declaring a forfeiture.

Instead of declaring a forfeiture, the lessor may waive it, affirm the continuance of the lease, and recover the amount specified in such lease as damages for a failure to comply with its terms.¹⁷⁴ If the lessees do not covenant to pay rent or develop the mine, but the lease contains a provision that the lease shall become void and all rights cease unless a well should be completed within a specified period of time, or unless the lessee pay rent at a certain rate per month or year in advance, the failure to explore for oil will merely work a forfeiture of the lease and not impose any pecuniary liability on the lessee.¹⁷⁵

¹⁷⁴ Springer v. Citizens' Natural Gas Co., 145 Pa. St. 430; 22 Atl. Rep. 986, following Ray v. Gas Co., 138 Pa. St. 576; 20 Atl. Rep. 1065.

¹⁷⁵ Glasgow v. Chartiers Oil Co., 152 Pa. St. 48; 25 Atl. Rep. 232; affirming Glasgow v. Griffith, 22 Pittsb. L. J. (N. S.) 181.

CHAPTER VI.

ASSIGNMENT AND SUBLETTING OF LEASE.

- §193. Lessor — lessee.
- §194. Interest assignee secures.
- §195. Assignee cannot take advantage of default in lease.
- §196. Refusing consent to assignment.
- §197. Sublease.— Division.
- §198. Assignment carries option.
- §199. Transfer of lease by judicial sale.
- §200. Equitable assignee in possession.
- §201. Lease unassignable.
- §202. Assignment of royalties.— Administrators.
- §203. Assignee of lessee bound by agreements in lease.— Privity of estate.
- §204. Ground of assignee's liability to lessor.
- §205. Assignee's liability broadened by terms of assignment or by outside contract.
- §206. Extent of assignee's liability.
- §207. Liability of assignee of a part interest in lease.
- §208. Liability of occupier under unassigned lease.
- §209. Assignee not taking possession liable.
- §210. Several successive assignees.
- §211. Lease not executed by lessee, but possession taken under lease, effect.
- §212. Lessee released by substitution of assignee.
- §213. Trustee of lessee and not his *cestuis que trustent* liable.
- §214. *Cestuis que trustent* may be liable.
- §215. Liability of assignee to his assignor.
- §216. Assignor liable on account of lease as a surety.
- §217. Sublease.— Liability of sublessee.

§193. Lessor — lessee.

As a general rule a lessor may assign his right to an interest in a lease he has given on his real estate; or he may convey the realty itself which would usually carry his rights in the lease. And also as a general rule the lessee may assign the lease he has received; or if he has a freehold interest under it, he may convey by deed his freehold interest.

§194. Interest assignee secures.

The assignee secures just such interest as his assignor had at the time of the assignment — at least that is the general rule, but, under special circumstances, he may be entitled to assume the role of a purchaser for value without notice of the rights of others.¹ If he have notice of the rights of a prior lessee, he takes no greater rights than his assignor had acquired.² If the lease provide for a forfeiture under certain conditions, the assignee must at his peril ascertain whether or not a forfeiture has been incurred.³ The assignee is liable for the taxes on all improvements he places on the leasehold premises.⁴ And this is true where the several owners of a lease have so conducted themselves as to turn their several interests into a partnership.⁵

§195. Assignee cannot take advantage of default in lease.

If a default has been made in carrying out the provisions of the lease, whether made by the lessee or the assignee, neither such lessee nor his assignee can urge the default as an excuse for not carrying out its provisions; for such a provision "inures to the benefit of the lessor, and is not effective in behalf of the lessee, unless the lessor so elects."⁶

§196. Refusing consent to assignment.

If the lease of oil or mining land contain a covenant prohibiting an assignment without the consent of the lessor, such con-

¹ *Thompson v. Christie*, 139 Pa. St. 230; 20 Atl. Rep. 934; 11 L. R. A. 236.

² *Henderson v. Ferrell*, 183 Pa. St. 547; 41 W. N. C. 404; 38 Atl. Rep. 1018; *Simons v. Van Ingen*, 80 Pa. St. 330; *In re Huddell*, 16 Fed. Rep. 373; *Caley v. Portland (Colo.)*, 71 Pac. Rep. 892; *Colorado, etc., Co. v. Pryor*, 25 Colo. 540, 549; 57 Pac. Rep. 51.

³ *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22.

⁴ *In re Huddell*, 16 Fed. Rep. 373.

⁵ *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608.

A verbal transfer, followed by a change of possession, is probably a valid transfer of the lessee's interest. *Lockhart v. Rollins*, 2 Idaho 503; 21 Pac. Rep. 413.

⁶ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Wills v. Mfg., etc., Co.*, 130 Pa. St. 220; 18 Atl. Rep. 721; *Ray v. Western, etc., Gas Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; *Creveling v. West End Iron Co.*, 51 N. J. L. 34; 16 Atl. Rep. 184; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219.

sent not to be unreasonably refused, or refused to a person of responsibility and respectability. The lessor may reasonably refuse to give his consent to an assignment to a corporation which does not take it with the intention to operate the land, for such corporation is not a person of responsibility and respectability within the meaning of the covenant in the lease, and that, too, even though there be no covenant to operate works already on the lease.⁷

§197. Sublease.— Division.

A sale of the gas flowing from a gas well, by the lessees, to a gas company, which takes charge of the gas and conducts it off the premises, is not an assignment, but a sublease of the well itself.⁸ If a lessee has the right, by the terms of his lease, to sublet and subdivide the premises, he may release a part of them set off in partition to one of several tenants in common, and retain the lease in operation upon the remainder of such land.⁹

§198. Assignment carries option.

The assignment of a lease carries with it an option given in such lease to the lessee; and the assignee is entitled to exercise such option upon exactly the same terms as the lessee would have been entitled to if he had kept the lease. Thus where the lease of a farm for oil purposes gave an option to a lease on an adjoining tract on "terms that may be equal to the best terms offered by any person or persons therefor"; and the lessor falsely represented to the assignee that he had been offered twenty thousand dollars for a lease of the tract, when he had been offered only ten thousand dollars for it; and the assignee paid the larger sum in ignorance of the falsehood, it was held that he had a right to exercise the option given by the terms of the lease the same as the lessee had, and could recover back one-half the sum he had paid (with interest).¹⁰

⁷ *Harrison v. Barrow*, 63 L. T. Co., 5 Ohio C. D. 620; 12 Ohio Cir. Rep. 834.

⁸ *Akin v. Marshall Oil Co.*, 188 Pa. St. 614; 41 Atl. Rep. 748.

¹⁰ *Guffey v. Claver*, 146 Pa. St. 548; 23 Atl. Rep. 161.

⁹ *Blair v. Northwestern, etc., Gas*

§199. Transfer of lease by judicial sale.

A lease may be transferred by a judicial or sheriff's sale of the lessee's interest in it, and the purchaser takes the latter's place, standing upon no higher plane in any respect, and, like the tenant, is liable for all taxes or improvements placed by himself upon the leased premises.¹¹ The sale of the lease carries with it all the right of the lessee.¹² If the sale is by a receiver of a court, no title to the lease passes until the sale and assignment of the lease has been approved by the court; and until then the purchaser is not liable on the covenants and agreements contained in the lease even if he take possession. The lessor, in such an instance, has the burden to show that all steps necessary to vest the title to the lease in the assignee or purchaser were taken.¹³ The fact that the lessor makes a new agreement with the assignee will not release the lessee from his liability under the terms of the lease as they were when the assignment was made.¹⁴ The fact that the lessee may have intended to assign the lease to a company that was to be formed, will not release him from liability on the covenants of the lease, even though the lessor knew of the possibility of the assignment.¹⁵ Where the lease provided that the lessee should pay five hundred dollars for the first well drilled, and five hundred for each well thereafter drilled; and after the first well was drilled he assigned the lease, and then the assignee put down a well, it was held that the lessee was liable to pay five hundred dollars for the well the assignee put down.¹⁶

¹¹ *In re Huddell*, 16 Fed. Rep. 373; *Lykens Valley Co. v. Dock*, 62 Pa. St. 232; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Jashanosky v. Volrath*, 59 Ohio St. 540; 53 N. E. Rep. 46; 69 Am. St. Rep. 786; *Simons v. Van Ingen*, 86 Pa. St. 330; *Acklin v. Waltermier*, 10 Ohio C. C. Dec. 629; 19 Ohio C. C. Rep. 372.

¹² *Murphy v. Hardee*, 12 Ohio Cir. Ct. Dec. 837.

¹³ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

¹⁴ *Fisher v. Milliken*, 8 Pa. St. 111.

¹⁵ *Sanders v. Sharp*, 153 Pa. St. 555; 31 W. N. C. 374; 25 Atl. Rep. 524.

¹⁶ *Pittsburgh, etc., Co. v. Greenle*, 164 Pa. St. 549; 30 Atl. Rep. 489.

§200. Equitable assignee in possession.

An equitable assignee, though he takes possession under the lease, is not a legal assignee, nor is he liable on the covenants of the lease to the lessor. Thus where a lease was not assignable without the consent of the lessor, but the lessee agreed in writing to assign the lease to certain persons, who took possession of the premises and worked the mines upon them, but no deed of assignment was ever executed to them; and these persons afterward assigned over all their interests to an indigent workman, the court declared the assignment to be a good equitable one under the agreement, but the persons with whom the agreement was made were not liable at the suit of the lessor for the performance of the covenants, for the agreements in the lease were not between the lessor and such persons, and a court of equity could not treat the agreement as a tenancy.¹⁷ But where the lease was to a trustee for five other persons, who entered and worked the mines; and the trustee becoming insolvent, the lessor sued these five persons for the rent, it was decreed that an account should be taken of the amount due the lessor, by the trustee, and if he made default, then an account should be taken of the moneys of these five persons in his hands, and the amount due the lessor paid thereout; and in case such moneys should not be sufficient to pay the lessor, then such five persons were to each pay one-fifth part of the deficiency; and they should continue to pay so long as the rents became due.¹⁸

§201. Lease unassignable.

If a lease be unassignable — as, for instance, if it have no words in it making it run to the assigns of the lessee, or if there is an express statement in it that it is not or can not be assigned — that will not permit one who takes possession under it by virtue of an attempted assignment to escape liability to the lessor. In such an instance the occupant of the ground is

¹⁷ *Cox v. Bishop*, 8 De G. M. and G. 815; 26 L. J. Ch. 389; 3 Jur. (N. S.) 499; 29 L. T. 44; 5 W. R. 437.

¹⁸ *Lee v. Roundwood Colliery Co.* [1897], 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324.

liable to the owner upon an implied assumpsit to pay a reasonable compensation for his occupation, or for trespass for the wrongful occupation.¹⁹ And the lessor may obtain a right against the assignee where he and the latter have entered into an agreement with respect to the occupancy of the premises by reason of such assignee having taken possession under the attempted assignment. Such was the case where an agreement was entered into between the lessor and assignee for an extension of the time of performance of the covenants of the lease, for the payment of increased royalties, and also into a provision that the lease "shall remain in full force in all particulars in which the same is not hereby modified." This gave the assignee all the rights of the original lessee, even to a renewal of the lease.²⁰

§202. **Assignment of royalties. — Administrator.**

A lessor may assign a lease he has given, either by proper words of assignment on the lease, if he can obtain possession of it, or by a separate instrument; and his assignment will carry the rent or royalties thereafter falling due, but not those that have fallen due before the date of the assignment, unless the

¹⁹ *Walters v. Northern Coal Mining Co.*, 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1. But see *Oil Creek, etc., v. Stanton Oil Co.*, 23 Pa. Co. Ct. Rep. 153; 30 Pittsb. L. J. (N. S.) 286.

²⁰ *Guffey v. Clever*, 146 Pa. St. 548; 23 Atl. Rep. 161.

A lease contained a clause that it should terminate on "a sale or transfer" of the property during the term, it was held that the word "transfer" related to a transfer of the title, and not a mere transfer of the right of possession. *Ober v. Schenck*, 23 Utah 614; 65 Pac. Rep. 1073.

A deed conferring upon skilled miners the privilege to raise ore, with the use of timbers and water

on the tract, to have and to hold the land as long as they should deem it worthy of searching for minerals, in which they agree to not use the land for any other purposes, is an unassignable lease; because the personal skill of the miners has been contracted for. *Hodgson v. Perkins*, 84 Va. 706; 5 S. E. Rep. 710.

An oil well on a lease to continue as long as oil could be procured from the premises in paying quantities, was abandoned by the lessees, because of the failure of the output. It was held that the assignment of the lease thereafter gave no title to the assignee, even though the lessees had first attempted to renew it. *Cole v. Taylor*, 8 Super. Ct. (Pa.) 19.

right to them is also assigned. In order to assign the lease it is not necessary to make a sale or transfer of his reversionary interest in the land. A lease was assigned after it had expired, by the use of the following language endorsed upon it: "For value received we hereby sell, transfer and assign all our interests, right and title in and to the original contract to," a person being named as assignee. It was claimed that this did not pass the right to collect damages then due by the terms of the lease, but the court held otherwise. "They had a right of action under the contract," said the court, "and when they assigned all their rights and interest therein, they assigned this right of action. The time for which the land was leased having expired, there remained nothing but this right of action to be transferred. To hold that the assignment transferred only the original instrument would be too narrow a construction."²¹ So where the owner of land executes a gas or oil lease upon it, and afterward conveys the land by an ordinary quit claim or warranty deed the grantee is entitled to the rents maturing after the conveyance.²² But where a lease for years reserves a certain royalty for all oil or gas produced, the royalty reserved goes to the personal representatives of the deceased lessor, and not to his heirs.²³ So where the royalty reserved was a certain fraction of the oil produced; and afterward the lessor gave the land to his children, reserving to himself a life estate in it, it

²¹ Indianapolis, etc., Gas Co. v. Pierce, 25 Ind. App. 116; 56 N. E. Rep. 137. See Morgan v. Yard, 13 Pittsb. L. J. (N. S.) 178; 12 W. N. C. 449; Chandler v. Pittsburgh, etc., Co., 20 Ind. App. 165; 50 N. E. Rep. 400.

²² Chandler v. Pittsburgh, etc., Co., 20 Ind. App. 165; 50 N. E. Rep. 400. In Swint v. McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. Rep. 1021, it was assumed that the rents passed to the grantee. Undue rents for coal pass. Hendrix v. McBeth, 61 Ind. 473; 28 Amer. Rep. 680; Hendrix v. Hendrix, 65 Ind. 329; McDowell v. Hendrix, 67 Ind. 513;

Woodburn's Estate, 138 Pa. St. 606; 21 Atl. Rep. 16; 21 Am. St. Rep. 932 (oil and gas); Manderbach v. Bethany, etc., Home, 109 Pa. St. 231; 2 Atl. Rep. 422 (rent for water from a spring). See Butt v. Ellett, 19 Wall. 544; Van Rensselaer v. Hays, 19 N. Y. 68; 75 Am. Dec. 278; Peerrin v. Lepper, 34 Mien. 292; McGuffie v. Carter, 42 Mich. 497; 4 N. W. Rep. 211; Page v. Culver, 55 Mo. App. 606; West Shore Mills Co. v. Edwards, 24 Ore. 475; 33 Pac. Rep. 987; Morrow v. Sawyer, 82 Ga. 226; 8 S. E. Rep. 51.

²³ Brunot's Estate, 29 Pittsb. L. J. (N. S.) 105.

was held that he was entitled to the royalty, under the rule that the life-tenant is entitled to work all wells open at the time the tenancy is created.²⁴ Where a testator owned six hundred acres of land, divided into three adjoining farms, upon all of which was an oil lease, in which a certain royalty was reserved and which had twelve years to run at his death; and wells, when he died, were in operation on one farm only, which was given by his will to one of his three children, and the other two farms to his other two children severally, the court decided that the royalties should also be divided, and one-third given to each devisee; for the reason that the working of the oil wells on the one farm had the effect to drain the oil from the other two farms, and thus the devisee of those two farms would receive no benefit from the lease which covered their farms.²⁵ If the owner of the reversion has sold the premises, he cannot maintain an action in his own name for the use of his vendee, for a breach of a covenant that has occurred after he has made the sale.²⁶

²⁴ *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 123.

Where the owner of land conveyed it, reserving for life one-eighth of the oil produced, and the grantee leased the land, reserving to himself one-eighth, it was held that the last reservation was one-eighth of seven-eighths, for it could not be contended that when he made his reservation he intended to reserve any part of the oil reserved by the original grantor, but he reserved a share only of that which he was entitled to under his grant. *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559.

²⁵ *Wettengel v. Gormley*, 160 Pa. St. 559; 28 Atl. Rep. 934; 40 Am. St. Rep. 733; *Wettengel v. Gormley*, 184 Pa. St. 364; 39 Atl. Rep. 1118. But see where the Ohio Supreme Court refused to follow these cases. *Northwestern Ohio Nat. Gas Co. v. Ullery*, 67 N. E. Rep. 494.

²⁶ *Stoddard v. Emery*, 128 Pa. St. 436; 18 Atl. Rep. 339.

The owner of oil land conveyed an undivided interest in it, and gave to the grantees the right to drill for oil on the portion un conveyed, reserving a royalty to himself. Afterward he sold the remaining undivided interest, subject to the oil lease, of which he finally became the assignee. By will he left all his property to his devisees, and they conveyed to third parties, reciting in the deed that it was their intention to convey all lands and premises owned by them, and in which they had an interest. It was held that the conveyance passed no rights under the oil lease, for it was a mere incorporeal right, which the conveyance did not embrace. *Wagner v. Mallory*, 41 N. Y. App. Div. 126; 58 N. Y. Supp. 526; affirmed 169 N. Y. 501; 62 N. E. Rep. 584. But did not the holders of the lease have an interest in the

If there has been a joint reservation of royalties, an assignment of his interest in the lease by one of those jointly interested does not amount to a severance of the royalties nor apportionment of them among the co-lessors, but the assignee becomes a tenant in common of the royalties with the co-lessors, and any one of them can receipt for the same.²⁷

§203. Assignee of lessee bound by agreements in lease.— Privity of estate.

The assignee of a lessee of a lease takes the position of his assignor and becomes bound by all the terms, agreements and covenants of the lease to the lessor, to be performed while he holds the lease, the same as if he had been the original lessee. "The original lessee is bound by the contract," to quote from an opinion of the Court of Indiana, "to make the payments. The assignees are bound by their acceptance of the lease, to make good the covenants to pay rent, therein contained. Their liability is upon the covenants, and arises, not from any express assumption or agreement to pay it, which might be contained in the written assignment, but from the privity of estate by reason of their ownership and right to enjoy the benefit of the lease. Covenants to pay rent and royalties run with the land."²⁸ "The assignee is answerable for the rent," said the Supreme Court of California, "during his ownership of the terms under the assignment, and his liability therefor arises out of the privity of estate, and this, without reference to any obligation assumed by him in the contract of assignment."²⁹ The Supreme Court

land? See *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

²⁷ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021.

²⁸ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196, citing *Watson Coal, etc., Co. v. Casteel*, 73 Ind. 296; *McDowell v. Hendrix*, 67 Ind. 513; *Gordon v. George*, 12 Ind. 408; *Stewart v. Long Island Ry. Co.*, 102 N. Y. 601; *Moule v.*

Garrett, L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697.

²⁹ *Bonetti v. Treat*, 91 Cal. 223; 27 Pac. Rep. 612; *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66; *Goddard's Appeal*, 1 Walker (Pa.) 97 *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; 4 Atl. Rep. 218; *Washington, etc., Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799; 11 Morr.

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of Pennsylvania has stated the rule in a single sentence, thus: "It is settled law that covenants to pay rent or royalty run with the land, and that the assignee of the lease is liable for the payment of all rents or royalties which accrue while he held the assignment of the lease."³⁰ Of course, when the lessor seeks to hold the assignee liable on the covenants and agreements in the lease, he has the burden to show that an actual assignment was made.³¹

§204. Ground of assignee's liability to lessor.

By the assignment of the lease a privity of estate is not created between the assignee and the lessor for that period prior to the assignment, nor for the part of the lease remaining after he has ceased to enjoy it. "The assignee, having entered under an assignment and thus come into privity, that privity continues as long as his beneficial enjoyment of the demised property or right to it remains."³² The liability of the assignee to the lessor is, therefore, based upon their privity of estate, and not necessarily upon an agreement to keep the covenants of the lease. "A lessee," said Judge Simonton, "remains liable on his express obligation, notwithstanding he may have assigned his lease. And the lessor may sue at his election either the lessee or the assignee, or may pursue this remedy against both at the same time, though, of course, with but one satisfaction. In such cases, the liability of the original lessee depends upon privity of contract and continues during the whole term, while the liability of the assignee depends upon privity of estate, created by the assignment and continues only during the time

Min. Rep. 165; *Goss v. Fire Brick Co.*, 4 Super. Ct. (Pa.) 167; *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Williams v. Short*, 155 Pa. St. 480; 26 Atl. Rep. 662; *Comegys v. Russell*, 175 Pa. St. 166; 34 Atl. Rep. 657; *Fennell v. Guffey*, 155 Pa. St. 38; 25 Atl. Rep. 785; *Springer v. Citizens', etc., Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22;

Walters v. Northern, etc., Co., 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1.

³⁰ *Fennell v. Guffey*, 139 Pa. St. 341; 20 Atl. Rep. 1048; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

³¹ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

³² *Negley v. Morgan*, 46 Pa. St. 281.

he holds legal title to the leasehold estate during the assignment."³³ "For, although there was no privity of contract between the lessor and the assignee of the lessees, yet there was a privity of estate between them, as long as the assignee remained in possession of the demised premises, which created the debt for the rent or royalty reserved in the lease, in favor of the lessor and against the assignee."³⁴ "Turning then to the question raised by the points," said the Supreme Court of Pennsylvania, "we find the facts to be assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffey run with the land. That they continued liable, notwithstanding their assignment to Robbins, is very clear. The covenant was their own, and their privity of contract with their lessors continued notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable, because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by the assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity; but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relation with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens by assignment, even though, as is said is done in the case, his assignment be to a beggar."³⁵ And the court referred to the claim that a certain case³⁶ held

³³ *McBee v. Sampson*, 66 Fed. Rep. 416; *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 164; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Wall v. Hinds*, 4 Gray 256; *Smith v. Harrison*, 42 Ohio St. 180.

³⁴ *Watson, etc., Co. v. Casteel*, 73 Ind. 296, citing *Howland v. Coffin*, 9 Pick. 52; *Gordon v. George*, 12

Ind. 408; *Carley v. Lewis*, 24 Ind. 23; *McDowell v. Hendrix*, 67 Ind. 513.

³⁵ *Washington, etc., Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799.

³⁶ *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; 4 Atl. Rep. 218.

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a different rule, and declared it was clearly distinguishable from the case then in hand. "The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to 'continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption.' Two wells were completed, and were successful oil wells. The assignee of the lessor owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and 'without interruption.' The obligation of a covenant to prosecute the business developing the land of the lessor without delay and without interruption, is a continuing one. The breach for which the Bradford Oil Co. was held liable was not that of some previous holder of the title, but its owner."³⁷

§205. Assignee's liability broadened by terms of assignment or by outside contract.

The liability of an assignee may be broadened by the terms of the assignment, or by a contract outside of it. If there be express covenants in the assignment, they are so many additions to the covenants of the lease, and the lessor may take advantage of them if they run in his favor.³⁸ Thus if the assignment provides that the assignee shall hold the lease under the terms of the lease and subject to the rents and covenants therein on the part of the lessee, and he accepts it, he will be liable for rentals which had matured and remained unpaid at the time

³⁷ *Akin v. Marshall Oil Co.*, 188 Pa. St. 614; 41 Atl. Rep. 748; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22; *Drake v. Laco*e, 157 Pa. St. 17; 27 Atl. Rep. 538; *Borland's Appeal*, 66 Pa. St. 470; *Goss v. Brick Co.*, 4 Super. Ct. (Pa.) 167.

See the excellent statement of the liability in *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

³⁸ *Consolidated Coal Co. v. Peers*, 39 Ill. App. 453; same case, 150 Ill. 344; 37 N. E. Rep. 937; *Goddard's Appeal*, 1 Walk. (Pa.) 97.

it was executed.³⁹ An agreement to perform the covenants of the lease renders the assignee liable for the unperformed covenants; and also renders him liable for the rent or royalties accruing after he may have also assigned the lease to another.⁴⁰

§206. Extent of assignee's liability.

While the assignee is liable for the carrying out of the terms of the lease, yet he is liable only for those obligations that accrue while he enjoys its privileges, or, as it has been said, during the continuance of his own estate. His agreement is that during his estate he will pay the rents or royalties due under and perform the covenants of the lease.⁴¹ He is not liable, without an express agreement in the assignment, to pay for rents or royalties that had accrued, or for the performance of covenants that were to be performed in point of time before the assignment. Thus where the assigned lease provided that a well should be completed within a certain time, and if not a specified sum of money per year should be paid for each year during which the completion of a well was delayed, it was held that the assignee was not liable for the payment of such sum, where he assigned the lease before the lapse of the year; for the amount due did not and could not accrue before he assigned the lease, and consequently he was not liable.⁴² Nor is the assignee liable for damages for failure to dig a well upon the demised premises when the time for the completion of the well expired before the lease was assigned.⁴³ If the time for the

³⁹ Woodland Oil Co. v. Crawford, 55 Ohio St. 161; 36 Ohio L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62.

⁴⁰ Port v. Jackson, 17 Johns. 239; Martineau v. Steele, 14 Wis. 272.

⁴¹ Wolveridge v. Steward, 1 C. and M. 644; 2 L. J. Exch. 303; 3 Tyr. 637; Moule v. Garrett, L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697; Washington, etc., Gas Co. v. Johnson, 123 Pa. St. 576; 16 Atl. Rep. 799;

11 Morr. Min. Rep. 165; Walters v. Northern Coal Mining Co., 25 L. J. (N. S.) Ch. 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1; Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁴² Watt v. Equitable Gas Co., 8 Super. Ct. (Pa.) 618; 29 Pittsb. L. J. (N. S.) 221; 43 W. N. C. 215.

⁴³ Washington, etc., Gas Co. v. Johnson, *supra*.

completion of the well had expired after the assignment, the assignee would have been liable.⁴⁴ In a coal lease it was provided that royalties should be paid semi-annually, and if the amount due at the end of any half year remained due at the end of a year thereafter, the lease by reason of such delinquency was forfeited, and the lessor was authorized "to enter and take possession without recourse to law." Four years after its execution the lessee gave E and others an option to purchase the lease, one of the conditions being that they should test the character of the oil veins on the land by boring down through them. After the boring was done, and nearly a year after the option was given, E notified the lessee that they accepted his option. More than a year after this notice was given, E and his associates called upon the lessor to pay any royalties then due, and were told by him that none were due, but if there were, he would not take them from them — from E and his associates. Two months afterwards the lessor re-entered for the non-payment of the royalties within a year after they had accrued. It was shown that the lessor knew that E and his associates had been boring upon the land, and that he had pointed out to them the boundary lines of the tract. It was held that E and his associates were bound to take notice of the covenants of the lease; that the fact the lessor knew of the negotiations for the assignment of the lease gave E and his associates no rights as against the lessor, except such as the lessee had, and imposed no duties on the lessor toward them, except such as he was bound to the lessee under the terms of the lease; that E and those with him were bound to take notice whether the royalties had been and were being paid, what was the state of the accounts, the responsibility for which they were about to assume; that as they had neither paid nor offered to pay the royalties they had no higher standing than the lessee so far as their contract rights were concerned; and that the lessor was not estopped as against them by the fact that he knew the boring was going on, or by what he had said to them.⁴⁵ A

⁴⁴ *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22. ⁴⁵ *Comegys v. Russell*, 175 Pa. St. 166; 34 Atl. Rep. 657.

lessee assigned an oil lease, in consideration of which it was agreed that if the assignee or his assignees should "operate under the said leaseholds, that on each of the leases he so operates, and if the oil is found in paying quantities, the said assignee or his assignees agree to pay the lessee" one hundred dollars for the leasehold upon which a paying well was found. The assignee surrendered the leases to the lessors and took new ones containing the same provisions, which he assigned to innocent parties. It was held that the lessee's claim for payment could be enforced only when oil had been found on the land in paying quantities; and in that case, by whomsoever found, a recovery could be had against the assignee; but the fact of the surrender gave no cause of action.⁴⁶ When the lessor sues the assignee on the covenants of the lease, he has the burden to show an actual assignment. And where the receiver of a lessee assigned the lease, but the assignment or transfer was never approved by the court, it was held that the assignee was not liable on the covenants contained in the lease.⁴⁷

§207. Liability of assignee of a part interest in lease.

Where the lessee assigns only a part of the lease, as an undivided fourth part, and he and the assignee operate the lease together as partners, the liability of the assignee may be broader than it otherwise would have been.⁴⁸ Thus a written assignment of an undivided one-half of a lessee's interest in an oil and gas lease, together with his entire gas right therein, was held to make the assignee a joint owner of the lease, and jointly liable thereunder with the original lessee.⁴⁹ The court was also of the opinion that the assignee of a one-half or other distinct interest in the lease was jointly liable for the performance of a covenant therein to sink an oil well or pay a monthly rental.

⁴⁶ *Smith v. Munhall*, 139 Pa. St. 253; 21 Atl. Rep. 735. See *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

⁴⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁴⁸ *Boydston v. Meacham*, 28 Mo. App. 494.

⁴⁹ *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624.

The assignee of an undivided interest of a partner in the usual oil or gas lease takes it subject to the partnership debts.⁵⁰

§208. Liability of occupier under unassigned lease.

If the lessee merely permit one to occupy the leased premises, such occupier is not liable to the lessor for the rent, nor for use and occupation of the premises; but if the occupier has an agreement for an assignment of the lease, and he call upon the lessee to make his agreement good, then the lessor may look to the occupier for the rents and performance of the covenants falling due during the time he is in possession of the premises.⁵¹

§209. Assignee not taking possession liable.

The assignee of an oil lease cannot escape liability on the ground that he never took actual possession, nor commenced operations on the leased premises without fault of the lessor. This is true according to the greater number of authorities.⁵² This is particularly true of the ordinary oil or gas lease. In speaking of an instance where possession had not been taken under an oil lease assigned, the court used the following language: "Whatever may be the rule as to an ordinary lease, where the subject matter is susceptible of actual possession and physical enjoyment, as to rights created by leases, such as this, where, until the well is completed, there can be no further enjoyment than the possession of the right, which may be exer-

⁵⁰ Chamberlain v. Dow, 16 W. N. C. 532.

⁵¹ Walters v. Northern Coal Mining Co., 25 L. J. Ch. (N. S.) 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1.

⁵² Edmonds v. Mounsey, 15 Ind. App. 399; 44 N. E. Rep. 196; Walton v. Cronly, 14 Wend. 63; Williams v. Bosanquet, 1 Brod. and Birg. 238; Burton v. Barclay, 7 Bing. 745; Cook v. Harris, 1 Ld.

Raym. 367; Babcock v. Scoville, 56 Ill. 461; Board v. Boatman's Ins. Co., 5 Mo. App. 91; Smith v. Brinker, 17 Mo. 148; Willi v. Dryden, 52 Mo. 319; University of Vermont v. Joslyn, 21 Vt. 52; Damainville v. Mann, 32 N. Y. 197; Carter v. Hammett, 18 Barb. 608; Fennell v. Guffey, 155 Pa. St. 38; 26 Atl. Rep. 785; Heller v. Dailey, 28 Ind. App. 555; 63 N. E. Rep. 490.

cised at will, the authorities bearing directly upon the proposition involved, authorizes us to declare that the obligations of the assignees are not postponed until the actual entry upon the land." ⁵³

§210. Several successive assignees,

If there be several successive assignees, each will be liable for the performance of the covenants or agreements contained in the lease which matured or required performance while he was in possession or enjoying the estate, or, in other words, so long as he held the lease. ⁵⁴

§211. Lease not executed by lessee, but possession taken under the lease, effect.

"It can make no difference in principle that the lease is not executed by the person to whom the demise is made — except that (in such a case) the landlord may not be able to maintain an action of covenant; but if the person to whom the demise is made accepts the lease, either by occupying the demised property himself or by permitting others (as his nominees or as his *cestuis que trustent*) to do so, the non-execution of the instrument of demise will not prevent the lessor from recovering the rent by distress or by action of debt against the lessee. Of course, where the demise is made to a person who neither executes the lease nor adopts it by entry or otherwise, he (the lessee) is a mere stranger against whom the landlord can have no rights; and if (in such last-mentioned case) other persons enter claiming to be the nominees or the *cestuis que trustent* of such non-executing and non-adopting lessee, the landlord's remedy must be by distress or (*semble*, by action of trespass), and is not either in debt or on covenant." ⁵⁵

⁵³ Edmonds v. Mounsey, *supra*.

⁵⁴ Bradford Oil Co. v. Blair, 113 Pa. St. 83; 4 Atl. Rep. 218; Washington, etc., Gas Co. v. Johnson, 123 Pa. St. 576; 16 Atl. Rep. 799; 11

Morr. Min. Rep. 152; Heller v. Daley, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁵⁵ Bainbridge on Mines (5th ed.), p. 294.

§212. Lessee released by substitution of assignee.

But a lessee may be released by the act of the lessor in accepting and substituting the assignee in place of the lessee. Thus in an Indiana case it was said by the court: "There has been a diversity of decision both as to the facts which may constitute a surrender by operation of law and as to the legal principles applicable thereto. We will not undertake to discuss the general subject, but will confine our observations to the instance of a substitution of tenants and to the case where there has been an assignment by the lessee to a third person. If the law will imply a surrender in a given case, it would seem to be reasonably clear that the implication will arise from the acts of the parties, and will not be based upon proof of an oral agreement between lessor and lessee. The one, whether lessor or lessee, against whom such a surrender is asserted by the other, must have been a party to some action from which a surrender may properly be presumed by the court. The surrender should be indicated by acts. We will not pause to seek to reconcile the various opinions as to the principle of law on which this conclusion of the court should proceed. If the lessee assign to a third person, and the lessor accept rents from the assignee in peaceable possession, it may be presumed, from this act of the lessor in accepting the rent due from the lessee through hands of another in possession, that the lessor acquiesces in the assignment; but such conduct does not necessarily indicate that the lessor has been a party to the creation of a new tenancy. Such facts may constitute evidence of an assignment, but not of a surrender, and if a surrender may be established by the further proof of a parol agreement between the lessor and the lessee, to which the assignee was not a party, this would be basing the essential fact constituting the surrender upon parol evidence of an express contract, and not deriving it by act and operation of law. In *Frank v. Maquire*,^{*55} it is said: 'It surely is not necessary to cite cases to prove that a tenant is bound by his express contract to pay rent, even after he has

*55 42 Pa. St. 82.

assigned the term with his landlord's assent, and though the landlord has accepted the assignee as his tenant and received rent from him.' In *Creveling v. De Hart*,⁵⁶ an action by a lessor to recover from the lessee for non-payment of rent, a plea was held insufficient which stated that the lessee entered into negotiations with a third party named, and notified the lessor, who encouraged the lessee to sell and assign the lease to a third party, and therefore the lessee duly assigned and conveyed the same to such third party, who entered upon the demised premises and was duly accepted by the lessor as his tenant, and that lessor collected rent from the assignee, and recovered a judgment for rent which afterwards fell due. It was held that to make the plea show surrender in law it needed an averment that the assignee was substituted in place of the original lessee with the intent on the part of the parties to the demise to annul its obligations. In *Grommes v. Trust Co.*,^{*56} is the following language: 'Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the grantors. The assignee of a leasehold estate is liable for rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference in this respect that the lessor may have received rent from the assignee, and accepted him as tenant of the premises. Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and

⁵⁶ 54 N. J. Law 338; 23 Atl. Rep. 611.

*⁵⁶ 147 Ill. C34-648; 35 N. E. Rep. 823; 37 Am. St. Rep. 248.

a clear intent to make a new contract with the former and discharge the latter from further liability under the lease, both will be held liable to the lessor. We do not hold it necessary to show an express contract between the lessor and the assignee, but it seems to be requisite to show that the landlord, by his conduct, as between himself and the assignee, does not hold the latter merely to the obligation of an assignee of the term in possession, but has assumed an attitude inconsistent with the continuance of the contract relation between him and the original lessee, and has treated the assignee as his own tenant by substitution."⁵⁷ There must be a surrender, either in fact or by operation of law, of the premises by the lessee and a substitution of his assignee, to release the former from his liability on the covenants of the lease. That result must be attained before the lessee is free from liability.*⁵⁷

§213. Trustee of lessee and not his cestuis que trustent liable.

"In *Walter v. Northern Coal Mining Co.*,⁵⁸ where certain (coal) mines had been leased to a trustee for the defendant company at a fixed or certain rent, and at a tonnage (or tonnage) rent beyond; and the term was for forty years, determinable by the lessee at the end of every third year by giving one year's previous notice; and the defendant company entered into possession and worked the mines under the lease for a little over a year, and then abandoned the mines as unprofitable — never having paid any rent, or given any notice to determine the term; and about nine years afterwards the company went into liquidation, and the liquidator gave the notice to determine the term, protesting also that the lease was not a good lease;

⁵⁷ *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

On the question of substitution, see *Way v. Reed*, 6 Allen 364; *Hoerd v. Hahne*, 91 Ill. App. 514; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; 82 N. W. Rep. 893; *Levering v. Langley*, 8 Minn. 107 (Gil. 82); *Lyon v. Reed*, 13 M. &

W. 85; *Lynch v. Lynch*, 6 Irish L. Rep. 131; *Lewis v. Brooks*, 8 Up. Can. Q. B. 576.

*⁵⁷ *Donahoe v. Rich*, 2 Ind. App. 540; 28 N. E. Rep. 1001.

⁵⁸ 25 L. J. Ch. 633; 5 De G. M. and G. 629; 26 L. T. 167; 4 W. R. 140; 2 Jur. (N. S.) 1.

and the plaintiff (the lessor) thereupon commenced this action to recover from the company the alleged arrears of rent, alleging that it was a debt in equity of the company — the court said, that the lessor should have sued the trustee-lessee, and not the company (the *cestui que trust*), the relation being a purely legal relation.” *⁵⁸

§214. *Cestuis que trustent* may be liable.

“ If there should be an express contract between the *cestuis que trustent* and the landlord, that he (the landlord) should grant, and that they (the *cestuis que trustent*) or their trustees should accept, the lease, the landlord would in that case be entitled to a specific performance of the contract, and the *cestuis que trustent* would be compelled to fulfil their contract, and (either by themselves or by their trustees) to execute a counterpart of the lease, the landlord having first executed the lease — and after such lease and counterpart had been executed, the legal relations above enumerated would apply as between the landlord and his lessee (and the assignee of the lessee) — but otherwise the *cestuis que trustent* would remain exempt as before, the lessee only (or his assignee) being and remaining liable to the landlord.” ⁵⁹

§215. Liability of assignee to his assignor.

Between the assignee and his assignor there is such a privity of contract as renders the latter liable to the former, without an express contract to that effect, for a failure to carry out the covenants or agreements of the lease. If the lessee (the assignor) has to pay the rent falling due after the assignment, he may recover from the assignee the amount paid; and so if the lessee has to carry out any of the covenants, performance of which was to be made, by the terms of the lease, after the time of the assignment, the assignee will be liable to him for his

*⁵⁸ Bainbridge on Mines (5th ed.), p. 294.

⁵⁹ Bainbridge on Mines (5th ed.), p. 294.

failure to perform such covenants.⁶⁰ So the first assignee is liable for the rents accruing, or the covenants to be carried out, after he has assigned the lease; and if he has been compelled to pay or carry out he may recover the amount paid from his assignee; so the assignor (the lessee) may sue such remote assignee for default made during the time he holds the lease.⁶¹ There is an implied promise on the part of each successive assignee of a lease to indemnify the lessee against any breach of a covenant in a lease committed by the assignee during the continuance of his (the assignee's) estate — which implied promise is additional to (and not excluded by) the express covenant of indemnity which each assignee enters into with his own assignor.⁶² The contract, however, between the lessee (the assignor) and the assignee may be such as to modify or relieve the latter from liability to the former, though it cannot relieve such assignee from liability to the lessor for rents or royalties, or the like, accruing during the time he holds the lease.⁶³ But where a second assignee of the lease was to pay a cash sum as the consideration for the assignment, and an additional sum to be paid if oil be found on the premises, it was held that the lessor could not recover such additional sum, after oil was found by him; for the reason that it was merely a bonus to be paid to the first assignee and not a covenant to run with the land.⁶⁴ By no arrangement between the lessor and the assignee can they lessen the liability of the latter to the lessee, or render the latter's rights less valuable. Thus where a first lessee sublet a portion of his lease, and the sublessee agreed to drill two wells and pay the first lessee one-fourth of the product from them; and after completing one well, the sublessee procured a lease direct from the owner, which did not require

⁶⁰ *Burnett v. Lynch*, 5 B. and C. 589; 8 D. and R. 368; 4 L. J. (O. S.) K. B. 274; *Humble v. Langston*, 7 M. and W. 517; *Steward v. Wolveridge*, 9 Bing. 60; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490.

⁶¹ *Brinkley v. Hambleton*, 67 Md. 169; 8 Atl. Rep. 904; *Knupp v.*

Bright, 186 Pa. St. 181; 40 Atl. Rep. 414.

⁶² *Moule v. Garrett*, L. R. 5 Exch. 132; 39 L. J. Exch. 69; 22 L. T. 343; 18 W. R. 697.

⁶³ *Fisher v. Guffey*, 193 Pa. St. 393; 44 Atl. Rep. 459.

⁶⁴ *Fisher v. Guffey*, *supra*.

two wells to be dug, nor the payment of royalties if they were dug, it was held that this second lease was a fraud upon the first lessee.⁶⁵

§216. Assignor liable on account of lease as a surety.

The assignment of the lease does not release the assignor from the fulfillment of the covenants or engagements contained in it; and while the assignee continues to enjoy it, such assignor is in the position towards him of a surety, and such assignee is regarded in fact as the principal debtor.⁶⁶ Even though the lessor accept the assignee as a tenant that will not release the lessee from his covenant to pay rent or royalties; but his liability continues by privity of contract until the lease shall terminate.⁶⁷ The collection of rent from the assignee or subtenant will not amount to a surrender.⁶⁸ Nor can the assignee relieve himself from liability for a year's rent by surrendering the lease before the end of the year, for which the rent is to be paid, because of the failure to complete an oil or gas well, in the absence of any agreement to release or acquit the payment.⁶⁹

⁶⁵ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

⁶⁶ *Burnett v. Lynch*, 5 B. and C. 589; 8 D. and R. 368; 4 L. J. (O. S.) K. B. 274; *Humble v. Langston*, 7 M. and W. 517; *Washington, etc., Gas Co. v. Johnson*, 123 Pa. St. 576; 16 Atl. Rep. 799; 16 Morr. Min. Rep. 165; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937; *Sanders v. Sharp*, 153 Pa. St. 555; 25 Atl. Rep. 524.

⁶⁷ *Bonetti v. Treat*, 91 Cal. 223; 27 Pac. Rep. 612; *Creveling v. DeHart*, 54 N. J. L. 338; 23 Atl. Rep. 611; *Fisher v. Milliken*, 8 Pa. St. 111; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 35 N. E. Rep. 823; 37 Am. St. Rep. 248; *Frank v. Ma-*

quire, 42 Pa. St. 77; *Heller v. Dailey*, 28 Ind. App. 555; 63 N. E. Rep. 490; *Harris v. Heachman*, 62 Ia. 411; 17 N. W. Rep. 592; *Shaw v. Patridge*, 17 Vt. 626; *Way v. Reed*, 6 Allen 364; *Hoerd v. Hahne*, 91 Ill. App. 514; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; 82 N. W. Rep. 893; *Charlees v. Froebel*, 47 Mo. App. 45; *Lewis v. Brooks*, 8 Up. Can. Q. B. 576; *Levering v. Langley*, 8 Minn. 107.

⁶⁸ *Jones v. Barnes*, 45 Mo. App. 590.

⁶⁹ *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

A lessee of a gas lease was to pay a certain royalty. He assigned an undivided one-half interest therein to a corporation, to hold subject to the royalty contained in the

§217. Sublease — liability of sublessee.

A sublease is always less than the lease of the sublessor; it is only a part of the lease. Or, in other words, if the lessee parts with all his estate except such as he reserves, however small the reservation may be, this amounts to a sublease; while if he part with the whole leasehold estate, it will be an assignment. Some interest in the part of the premises sublet must remain in the lessee; hence if he assign a distinct portion of the premises — as one-half, by metes and bounds — it is an assignment and not a subletting.⁷⁰ If, however, as an illustration, a lease be for ten years, and the lessee should demise a distinct part or the whole of it for six years, that would be a subletting and not an assignment.⁷¹ Unlike the assignee of a lease, there is no privity of estate between the original lessor and a sublessee, and the latter is not liable to the former for any part of the rent due him nor for the performance of the covenants in the original lease.⁷² But the terms of the original lease must be carried out, either by the lessee or the sublessee, or the original lessor will have a right to terminate the lease, or have right of action for damages, as the case may be.⁷³ Of course, if a sublessee is accepted by the original lessor as his tenant, he then becomes liable to him the same as if he had his lease directly from such lessor.⁷⁴ If the original lease contain a prohibition against subleasing, it will not prevent an assignment; and so, *vice versa*.⁷⁵ If a subletting be prohibited by the orig-

lease, and thereafter assigned the other one-half interest to a second company. The first corporation operated the land under an agreement to account to the second company for one-half of the proceeds, the latter company to pay one-half of the expenses. It was held that the first company was liable for the entire royalty. *Burton v. Forest Oil Co. (Pa.)*, 54 Atl. Rep. 266.

⁷⁰ *Palmer v. Edwards*, Doug. 187, note; *Sands v. Hughes*, 53 N. Y. 287; *Bedford v. Terhune*, 30 N. Y. 457; *Boardman v. Wilson*, L. R. 4 C B. 57.

⁷¹ *Post v. Kearney*, 2 N. Y. 394; *Pingrey v. Watkins*, 15 Vt. 479; *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407.

⁷² *Halford v. Hatch*, Dougl. 187; *Dartmouth College v. Clough*, 8 N. H. 22; *McFarlan v. Watson*, 3 N. Y. 286; *Gibson v. Mullican*, 58 Tex. 430; *Jennings v. Alexander*, 1 Hilt. (N. Y.) 154; *Fulton v. Stuart*, 2 Ohio 215.

⁷³ *Elms v. Randall*, 4 Dana 519.

⁷⁴ *Stimmel v. Waters*, 2 Bush. 282.

⁷⁵ *Greenway v. Adams*, 12 Ves. Jr. 395; *Bockover v. Post*, 25 N. J. L.

inal lease, a violation of it in this respect will give the original lessor a right to have such original lease canceled;⁷⁶ which, of course, would carry down with it the sublease. But the lease is not avoided merely because there has been an assignment or subletting contrary to its provisions; it is merely voidable, at the option of the original lessor.⁷⁷ If the lessor accepts rent of the assignee or sublessee, after the assignment or subletting, with knowledge of such assignment or subletting, he will waive the right to re-enter and declare the original lease avoided.⁷⁸ A sale by the lessees of an oil or gas well, of all the oil or gas pumped or flowing from it, to a company taking charge of it and conducting the oil or gas off the premises, is not an assignment but a subletting.⁷⁹ In such an instance, equity has power to entertain a bill for discovery to ascertain the rights and relations of the parties to the lease and sublease, and to compel an accounting for the profits from the sale of oil and gas.⁸⁰ Under a right to sublet and subdivide, a lessee may release a part of the premises set off in partition to one of several tenants in common, and retain the lease in operation upon the remainder of the land.⁸¹

285; *Lynde v. Hough*, 27 Barb. 415; *Hargrave v. King*, 5 Ired. Eq. 430.

⁷⁶ *Stimmel v. Waters*, 2 Bush. 282.

⁷⁷ *Collier v. Cunningham*, 2 Ind. App. 254; 28 N. E. Rep. 341; *Jackson v. Groat*, 7 Cow. 285; *Cooney v. Hayes*, 40 Vt. 478; *Burnes v. McCubbin*, 3 Kan. 221; *Eldredge v. Bell*, 64 Ia. 125; 19 N. W. Rep. 879; *Shattuck v. Lovejoy*, 8 Gray 204.

⁷⁸ *O'Keefe v. Kennedy*, 3 Cush. 325; *Heeter v. Eckstein*, 50 How. Pr. 445; *Murray v. Harway*, 56 N. Y. 337.

⁷⁹ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

⁸⁰ *Ibid.*

⁸¹ *Blair v. Northwestern, etc., Co.*, 12 Ohio Cir. Ct. Rep. 78; 5 Ohio C. D. C. 620.

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CHAPTER VII.

RENTS AND ROYALTIES.

- §218. Limitations of chapter.
- §219. Construction of leases.
- §220. Various methods of fixing rents or royalties.
- §221. A royalty is rent.—“Mining rent.”
- §222. Definition of rent and rent charges.
- §223. Payment so much per well.
- §224. Royalty, percentage of profits or income.
- §225. Payment of operating expenses first.—Free gas.
- §226. Free gas.
- §227. Royalty in gas or oil used to operate leased premises.
- §228. When royalty due.—Removal of oil from premises.
- §229. When rent is due for failure to develop land.
- §230. To whom payable.—Joint lessors.
- §231. Damages for failure to deliver lessor his share.
- §232. Interest on royalties.
- §233. Waiver.—Parol evidence.
- §234. Surrender.—Tract “retained.”
- §235. Interdependent conditions.
- §236. New lease.
- §237. Termination of lease by failure to keep its terms.
- §238. Lessee cannot avoid payment by taking advantage of forfeiture clause.
- §239. Forfeiture clauses and liability for rent.
- §240. Surrender of lease necessary to escape liability for rent.
- §241. Eviction.
- §242. Rent to be paid if well not drilled.
- §243. Minimum production allowed.
- §244. Consideration for lease may be purchase money.
- §245. Consideration for grant part of minerals, creates an exception.
- §246. One well draining two tracts of land.
- §247. Oral change of lease discharging or changing rents.
- §248. Failure of oil, royalty ceases.
- §249. Rent for exhausted well.—Flooded well.
- §250. Instances of lessee’s liability.
- §251. Account rendered.
- §252. How collected.
- §253. Lien of royalty accruing during receivership.
- §254. Assignment of lease does not carry oil in tank on premises.

§218. Limitations of chapter.

The discussion of the subject of Rents and Royalties in this chapter must necessarily be limited, in order to avoid repetitions. The questions involved here are so intimately bound up with the subjects discussed in other chapters, that it is impossible to discuss all the cases without unnecessarily increasing the size of this volume. Under the chapters on "Duration of Leases," "Mortgagor and Mortgagee," "Life Tenants," "Forfeitures," "Assignments," will be found many cases on the subject of Rents and Royalties, that are pertinent to the several subjects of those chapters.

§219. Construction of leases.

In discussing the right of a lessor to rent or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be a doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such is not the case in an instance of an oil or gas lease; and the reason for this arises out of the well known transactions of oil and gas operators. These contracts are looked upon somewhat in the same light as contracts of insurance. By long experience insurance companies have been enabled to draw a policy which is often difficult to determine just what their liability may be. They have their attorneys who have spent years in studying contracts of insurance and the decisions of the courts, until they have become thoroughly versed in all phases of such contracts. On the other hand, the insured is usually without advice when entering into a contract of insurance, and he is almost universally ignorant of the rules of law applicable to such obligations. To such an extent is this true that the courts have adopted a construction, in cases of doubt or obscurity, favorable to the insured. What is true of insurance contracts, may be said to be true of oil or gas leases (if not of mining leases). The lessor usually knows nothing of the law applicable to such

instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used.¹

§220. Various methods of fixing rents or royalties.

There are various methods in vogue in fixing the rents or royalties that shall be paid for a mining or oil lease. Thus the rent may be (1) a fixed sum; or an (2) annual or other periodical sum; or (3) a royalty on the amount of the minerals or oil mined or produced, payable at fixed intervals or times; or (4) a royalty, not, however, less in the aggregate than a specified sum each year; or (5) a royalty accompanied by a covenant to mine a certain minimum amount or pay a certain sum thereon; or (6) in case of a gas lease, to bore so many wells and pay so much a well, or forfeit a certain sum per well for a failure to bore the required number; or (7) in case of an oil lease, to pay a certain percentage of the oil taken out of the premises. It is believed that these divisions practically cover all methods used in fixing the amount the lessee shall pay the lessor, aside from the covenants to erect improvements on the leased lands, or make repairs, or develop the premises leased.

§221. A royalty is rent — "Mining rent."

Royalty is another term for rent, but is limited (except such as given an author for the privilege of publishing his book, or a patentee for the use of a patent) to rents due for the right or privilege of taking minerals, oil or gas out of a designated tract of land. In the discussion hereafter, a distinction will be drawn between "rent" as such and "purchase money" under an instrument selling mineral and oil beneath the surface

¹ *Steelsmith v. Gartlan*, 45 W. R. A. 107; *Huggins v. Daley*, 99 Va. 27; 29 N. E. Rep. 978; 44 L. Fed. Rep. 606; 48 L. R. A. 320.

of a specified tract; and in such an instance whatever would not be a "rent" cannot be a "royalty," but must be "purchase money." In practice the term "mining rent" is used to designate the consideration given for a mining lease, whether such lease creates a tenancy, conveys a fee, or grants an incorporeal right or a mere license. Its true significance must be read or determined in connection with the rights granted.²

§222. Definition of rent and rent charges.

Rent has been defined as "a certain profit issuing yearly out of lands," as "return to the landlord for their annual use."³ Again: "Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate."⁴ A more extensive definition is as follows: "Rent, or render, reditus, signifies a compensation, or return, it being in the nature of an acknowledgment or recompense given for the possession of some corporeal inheritance. It must be a certain profit issuing out of lands and tenements corporal; that is, from some inheritance whereunto the owner or grantee of rent might (anciently) have recourse to restrain."⁵ A rent charge has been defined as "a rent granted out of lands by him who is the owner thereof, with an express clause of distress" and the reason assigned for this definition is because the lands were charged with the distress, and the grantee, without the clause, had no right of distress, because there was no fealty annexed to the grant."⁶ In another case it is said that a "rent charge is a rent reserved where the landlord has no reversionary interest. He would have," it was said, "for such rent, no right to distrain, unless the power be contained in the lease."⁷ And a rent charge has been distin-

² Where royalty on coal was considered part of the *corpus* of the estate and not a profit issuing out of it, see *Duff's Appeal*, 21 W. N. C. 490; *Hope's Appeal*, 3 Atl. Rep. 23; 2 Cent. Rep. 43; 33 Pittsb. L. J. (N. S.) 270.

³ *Boyd v. McCombs*, 4 Pa. St. 146.

⁴ *Marsh v. Butterworth*, 4 Mich. 575.

⁵ *Van Wicklen v. Paulson*, 14 Barb. 654. See *Bloodworth v. Stevens*, 51 Miss. 475; *Zouche v. Dalbaic* L. R. 10 Exch. 177; *People v. Van Rensselaer*, 8 Barb. 189.

⁶ *Spencer v. Austin*, 38 Vt. 258.

⁷ *Cornell v. Lamb*, 2 Cow. 652.

guished from an annuity by saying that a "rent charge is a burden imposed upon and issuing out of lands, whereas an annuity is chargeable only upon the person of the grantor."⁸ By these definitions it will be observed that rent, strictly speaking, is not a part of the real estate, but is profit issuing out of it. It will be necessary to bear these definitions in mind in determining the status of a rent or royalty reserved for the right to dig minerals or take oil or gas out of lands.

§223. Payment so much per well.

Occasionally a provision in a lease provides that the lessor's compensation shall be so much per well drilled or to be drilled. This is more frequently the case with respect to gas than oil wells; but occasionally it is applied to the latter. Thus a lease for gas and oil provided if gas only be found, the lessee should pay a stipulated sum per annum for each well "while the same is being used off the premises," but contained no clause inconsistent with this provision. It was held that the lessee was not required to pay such sum for a gas well whose product was not used, even though it might be used off the premises without loss to the lessee.⁹ In the printed part of a lease it was stipulated that the lessee should have the exclusive right to drill wells and operate them on a small plot of ground, for which it was to furnish gas for four residences, free of charge, so long as gas was obtained in paying quantities, and to pay a rental of two hundred dollars a year for each well completed. In the written portion it was stipulated that of the well rental, one hundred dollars should be paid in cash and one hundred dollars in gas. The cash payment was to be annually in advance, beginning with a certain date, to quote, "whether a gas well is drilled or not. The gas payment above named begins with this date," which was the date of the lease. The contract was carried out for two years according to the provisions in the written stipulations. A contention arising between the lessor and lessee, it was held that the cash and gas

⁸ *Wagstaff v. Lowerre*, 23 Barb. 209.

⁹ *Ohio Oil Co. v. Lane*, 59 Ohio St. 307; 52 N. E. Rep. 791.

payment were to be paid annually, whether a gas well was drilled or not.¹⁰ It is no defense to an action for rent, on a lessee's failure to drill more than two wells, where a lease required him to drill three wells within a specified time, or pay a year's rent, and also pay for all marketable wells two hundred dollars, that to drill a third well would destroy the other two, and would be of no use.¹¹ Where for the first well so much was to be paid if it produced a specified amount of oil, and so much more if the amount was greater; and if a second well was put down, a specified additional amount; and the first well failed, but the second was productive, it was held that the lessee must pay the additional sum for the second well, as provided for in the lease, even though the first well failed.¹² A lease provided that a well should be drilled within sixty days, a second within four months, a third within eight months, and a fourth within a year, the lessee "to pay one hundred and fifty dollars for each location," the location to be selected by both the lessor and lessee. The lessee was to hold fifteen acres only for each well drilled, unless they were all completed as agreed. The lease was held not to require the payment of location money for any well drilled in addition to the four provided for, for the reason that the lessee, on the completion of the four, was entitled to the oil right to the entire tract, and in that event an increased number of wells would benefit the lessor.¹³

§224. Royalty, percentage of profits or income.

The word "profit" used in an agreement to pay a certain portion "of all the profits realized from oil or gas" found on

¹⁰ Kokomo, etc., Gas Co. v. Albright, 18 Ind. App. 151; 47 N. E. Rep. 682. Dec. 650; reversing 4 Ohio N. P. 407.

¹¹ Young v. Equitable Gas Co., 5 Pa. Super. Ct. 232; 28 Pittsb. L. J. (N. S.) 75; 41 W. N. C. 24.

¹² Brushwood, etc., Co. v. Hickey (Pa.), 16 Atl. Rep. 70.

¹³ Ft. Orange Oil Co. v. Wichman, 17 Ohio Cir. Ct. Rep. 57; 9 Ohio

As to release of rent per well and substitution of another rent, by changing the number of wells, see Meeker v. Browing, 9 Ohio C. D. 108; 17 Ohio C. C. 548; and Hunter v. Apollo Oil and Gas Co. (Pa.), 54 Atl. Rep. 274.

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the leased premises, means the net amount realized after deducting the expenses, and is not the equivalent of "income."¹⁴ Where the agreement was to give a certain portion of the profits of all gas "conducted off the premises, for use or sale," above the costs, all expenses, including cost of pipes and materials, and payments for right of way and for employees' salaries, must be deducted from the sales.¹⁵ If there be no net profits, in such instances, the lessee is not liable, not even if he permit another to work the premises with the same understanding, who fails to realize profits, if the lease does not prohibit subletting.¹⁶ But where the royalty was fixed at a certain portion of the oil to be delivered, free of expense, in tanks or pipe lines, and on gas "at the rate of one-eighth of income dollars per year," it was held that the "income" referred to is the gross, not the net income.¹⁷

§225. Payment of operating expenses first.— Free gas.

A lease provided for the payment of a royalty on the gas actually produced, and also contained the following clause: "If gas is obtained in sufficient quantities and utilized off these premises, the consideration shall be the use thereof for domestic purposes and one-eighth of the gas sold for every gas well drilled on the premises herein described and piped off the same." The lease also provided that the lessees should have sufficient gas for the operation of the lease. It was held that the lessor had the right to the gas if it was obtained in sufficient quantities, only after the lessee had used gas for the purpose of operating his lease in a proper and reasonable manner.¹⁸

§226. Free gas.

A very common provision in oil or gas leases is that the lessor shall have sufficient gas, if any be found, for domestic or

¹⁴ *Potterie Gas Co. v. Potterie*, 179 Pa. St. 68; 36 Atl. Rep. 232.

¹⁵ *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

¹⁶ *Caley v. Portland*, 12 Colo. App. 397; 56 Pac. Rep. 350.

¹⁷ *Busby v. Russell*, 18 Ohio Cir. Ct. Rep. 12; 10 Ohio C. D. 23.

¹⁸ *Fanker v. Anderson*, 173 Pa. St. 86; 34 Atl. Rep. 434. See *Akin v. Marshall Oil Co.*, 188 Pa. St. 602; 41 Atl. Rep. 748.

a specified use, in addition to pay for the lease or a certain portion of the oil produced. This "free gas" may be regarded as a part of the royalty, as it in fact is. Such a contract is binding upon the lessee. Thus where a contract provided that one of the parties should have sufficient natural gas with which to operate his electric light plant so long as a gas well belonging to the other party would supply it, but allowing such other party to use gas from the well for other purposes, it was held valid; and as the lessor had erected an electric lighting plant at a large expense, which could be operated only with gas, and there was no other gas obtainable or accessible to the plant without great delay and expense, an injunction was issued to prevent the cutting off of the supply.¹⁹ A lease, executed July 25, required the lessees to drill a well within twelve months, or pay the lessor fifty-six dollars yearly as rent. It also provided that the lessee should furnish gas to heat and light the dwelling on the leased premises on or before November 15th, of the same year. It was held, notwithstanding these inconsistent provisions, that they were independent and lawful, and that the lessee was not excused from liability for a failure to furnish gas within the specified time by their neglect, to drill a well. In this case the lessee assigned the lease. The lessor sold the premises leased in 1896 to the plaintiff, who occupied them for some time thereafter. In 1898 this purchaser executed a deed absolute on its face, but only intended to secure a debt he owed to his grantees. This deed provided that the grantees were "to have the proceeds accruing from said lease." In 1899 these grantees conveyed the leased premises by quit claim deed to one M. at the request of the plaintiff. This quit claim deed was to secure M. for money he had loaned the plaintiff to pay the grantee in the deed of 1898. The plaintiff brought suit for a breach of the agreement in the lease to furnish gas for the dwelling on the leased premises. It was held that the plaintiff who occupied and used the leased land was

¹⁹ *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; 47 N. E. Rep. 147. The court cited *Graves v. Key City Gas Co.*, 83 Iowa 714; 50 N. W. Rep. 283. and *Whitman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492; 20 Atl. Rep. 1062, which have been discussed elsewhere.

the only one damaged by a breach of the agreement, and that he could maintain the action, and not the grantees in the deed — the word “proceeds” referring to the rentals stipulated in the lease, and being transferred on a condition never enforced.²⁰ A lease contained a provision requiring the lessee to furnish the lessor gas free for the latter’s residence on the premises. It gave the lessee the privilege to remove his machinery and fixtures, but provided if he abandoned the lease while there was a well furnishing gas sufficient for the residence, the well should be left in such a condition as it could be used by the lessor. It was held that the lessee could not remove the pipe from the well, thereby cutting off the supply of gas to the residence, regardless of the fact whether or not such pipe was personal property; and a complaint charging that he did remove the pipe, whereby the gas was wrongfully cut off, stated a good cause of action.²¹ Where a gas company entered into a contract with plaintiff, who was not the owner of the premises leased, to furnish gas for dwelling house purposes so long as a sufficient amount of gas would flow from its well; and a few years thereafter the company gave notice that it would cut off the supply of gas, claiming that the flow was no longer sufficient to supply the plaintiff, it was held he was not entitled to an injunction restraining the company cutting off the gas, in the absence of a showing that he had no other means of heating or lighting his dwelling.²² Under a provision that if gas be obtained on the leased premises in sufficient quantities and used off the premises, the lessor shall be entitled to the free use thereof for domestic purposes, the right of the lessor to the use of gas for such purposes is conditioned upon there being a sufficient quantity for that purpose remaining after its use in a reasonable manner by the lessee in the operation of the lease.²³ A right given a lessor to use gas for his mill and three houses is confined to an attachment to a well drilled on his own premises,

²⁰ *Indiana Natural Gas and Oil Co. v. Hinton*, 159 Ind. —; 64 N. E. Rep. 224.

²¹ *Ohio Oil Co. v. Geiest*, 30 Ind. App. —; 65 N. E. Rep. 534.

²² *Loy v. Madison, etc., Gas Co.*, 156 Ind. 332; 58 N. E. Rep. 844.

²³ *Fanker v. Anderson*, 173 Pa. St. 86; 34 Atl. Rep. 434.

and he cannot insist that he receive gas from a pipe line conveying gas from other wells beside that upon his own premises, although he was originally permitted to attach to a different pipe line which had been taken up. In this case — a case of a grist mill — the substitution of the roller process instead of the old burr process was held not a violation of the contract for free gas for the mill “as now erected and built,” the change not involving an increase in the consumption of gas.²⁴ If a city or town grant a gas company the exclusive right to the use of its streets, on condition that it furnish it with free gas “so long as they shall have the exclusive right to use the streets and alleys of said city for their pipes,” such company is only compelled to furnish the gas so long as they have the only right granted, and the granting of the privilege to another company giving it the right to lay pipes in the streets for the same purposes as the first grant, relieves the first company from its obligation to furnish free gas. In this case the second contract contained a condition precedent to the effect that such company should have such right if one or more gas wells were in operation within one year; and it was held that the holders of the original franchise were not relieved from furnishing free gas to the city until the condition in the second contract had been performed and the right to occupy the streets with its pipes by the second company acquired.²⁵

§227. Royalty in gas or oil used to operate leased premises.

It has been held in the case of a coal mine that upon coal consumed in running an engine to hoist the coal from the mine,

²⁴ *Pearce v. Bridgewater Gas Co.*, 28 Pittsb. Leg. J. (N. S.) 171.

²⁵ *Newark Gas and Fuel Co. v. Newark*, 8 Ohio S. and C. P. Dec. 418; 7 Ohio N. P. 76.

An assignee of the lease is bound to comply with the provision in the lease for free gas. *Peers v. Consolidated Coal Co.*, 59 Ill. App. 595; *Consolidated Coal Co. v. Peers*, 59 Ill. App. 604.

The case of *Evans v. Consumers'*

Gas Trust Co. (Ind.), 29 N. E. Rep. 398, 31 L. R. A. 673, was one containing a question of “free gas,” but a rehearing in it was granted, and no second opinion filed.

If a lessor land owner use free gas after forfeiture incurred, he will not waive his right to declare a forfeiture. *American Window Glass Co. v. Williams (Ind. App.)*, 66 N. E. Rep. 912.

no royalty was due. In that instance the lease provided for a royalty per ton on all coal mined, the ton in all cases to be 2,240 pounds prepared coal; and it was shown that it was the custom at the time of the execution of the lease to hoist prepared coal from the mines by the use of steam power obtained by the incidental consumption of the coal itself.²⁶ But where the lessee agreed to give a portion of all the oil and one-fourth of the profits of all gas "conducted off the premises or sold, it was held that in ascertaining the amount due lessor, all the expenses, including the cost of pipes and materials, payments for right of way and for employees' salaries must first be deducted, and one-fourth of the remainder paid him; and that gas used by the lessee should be charged for at the same rates as if sold to others.²⁷

§228. When royalty due,— removal of oil from premises.

The usual lease fixes the time when the royalty shall be paid — as, where it provides for payment of a royalty on all oil produced during the month. In such an event the royalty is due, of course, at the end of that period of time. As a rule little controversy can arise over the point of time when the royalty is payable. If the lease should provide that it was payable on each barrel of oil "mined, taken, or removed from the premises," then the royalty is due when the oil is removed from the well, and its maturity is not postponed until after its shipment.²⁸

²⁶ Wright v. Warrior Run Coal Co., 182 Pa. St. 514; 41 W. N. C. 179; 9 Kulp. 1; 28 Pittsb. L. J. (N. S.) 202; 38 Atl. Rep. 491.

²⁷ Akin v. Marshall Oil Co., 188 Pa. St. 614; 41 Atl. Rep. 748. See also Meeker v. Browning, 9 Ohio C. D. 108.

²⁸ Higgins v. California, etc., Co., 109 Cal. 304; 41 Pac. Rep. 1087.

A coal lease provided that the lessee should mine a certain quantity of coal yearly, and pay royalty

in quarterly installments. It was held that the year for which the payments were to be made commenced from the beginning of the actual "mining year," and not from the time at which the lessee had procured his machinery and was ready to proceed with mining operations. Flynn v. White Breast Coal Co., 72 Iowa 738; 32 N. W. Rep. 471.

Lessees of a stone quarry agreed to pay a certain rate for stone

§229. When rent is due for failure to develop land.

Frequently leases require the premises to be developed by a certain time, and if not developed, then the payment of a monthly or yearly rental. In such instances it becomes a question when the rent is payable. In one case a lease required a well to be completed within ninety days, and, "in case of failure so to do, to pay a yearly rental from the expiration of the ninety days until such well shall be completed." It was held that the annual rental was due only at the end of one year after the default, and not from the beginning of the lease.²⁹ Where the lease required the payment of eight dollars per annum from the time of its execution until a fixed date, and thereafter one hundred dollars annually for each gas well after its completion, but until a well was drilled the rent should be eight dollars, there being no clause binding the lessee to drill a well, it was held that the higher rental was not due until the well was completed.³⁰

§230. To whom payable — joint lessors.

Royalties or rent is payable, of course, to the lessor or his agent, or to the person designated in the lease as the beneficiary or recipient. On such a proposition as this, there can be no dispute. Of course, if the lessor assign or convey the lease, or convey the fee in the leased premises, without reserving the right to the rent or royalty, then it will be payable to his assignee or grantee. And if the lease be granted by two or more joint owners of the premises, and the rent or royalties

"shipped" by them. It was held that no royalty was due for stone quarried and ready for shipment, but not actually shipped. *Crawford v. Oman, etc., Co. (S. C.)*, 12 S. E. Rep. 929.

²⁹ *Evans v. Consumers' Gas Trust Co. (Ind.)*, 29 N. E. Rep. 398; 31 L. R. A. 673. A rehearing was granted, however, in this case; and after that the appeal dismissed

without a second opinion being filed. It is not known on what point the rehearing was granted.

See *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196, and *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

³⁰ *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 346; 52 N. E. Rep. 782.

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fixed in it is reserved to them jointly, without a designation of any particular part due any of the lessors, payment to one will be a payment to all, especially so if there be no objection upon the part of the lessors not receiving them.³¹ And if the rent is payable to two lessors, one of whom in fact had no interest in the premises, in an action to recover one-half of the rent brought by the party having no interest in the premises, the lessee may show the circumstances under which such lessor signed the lease, not to deny his landlord's title, but to deny that, as to such alleged lessor, the lease created that relation.³² In such a case the assignment by the owner of his interest in the lease, does not amount to a severance of his interest nor an apportionment of the rent, as a matter of law.³³ Where a lease was put upon six hundred acres, divided into three farms, and the lessor dying devised them to his three children; and the lease provided that all its conditions should extend to the lessor's heirs, assigns and personal representatives, it was held that each child was entitled to a share in the royalties, proportioned according as his holdings bore to the six hundred acres, although the wells were all on one farm.³⁴ The grantor of leased premises may be entitled to the royalties, even though he made no reservation in his deed; and the lessee may show this fact when sued by the grantee in the deed of conveyance; and this was held particularly true where a wife and her husband, in a conveyance of her property, at the time of such conveyance, expected that a mortgage of the oil interests would be paid off, and that the rights would revert to them.³⁵ If the lessee assign the lease, reserving rent to himself, then his portion must be paid to him, while the portion to the lessor must be paid to such lessor.³⁶

³¹ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021; 28 Pittsb. L. J. (N. S.) 319; *Harness v. Eastern Oil Co.*, 49 W. Va. 232; 38 S. E. Rep. 662.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Wettengel v. Gormley*, 184 Pa. St. 354; 39 Atl. Rep. 57.

³⁵ *Simmons v. Buckeye Supply Co.*, 21 Ohio Cir. Ct. Rep. 455; 11 Ohio C. D. 690.

³⁶ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559.

§231. Damages for failure to deliver lessor his share.

If a lessee fail or refuse to deliver the lessor his share of the oil reserved as royalty he will be liable for the actual market value of the oil at the date of refusal to deliver, with interest from that date.³⁷

§232. Interest on royalties.

Interest begins to run on royalties from the date they are due, or if a demand for them is necessary before suit brought, then from the date of the demand. Where a notice of forfeiture was of no effect, for the reason that the demand for unpaid royalties was excessive, it was held that the lessee was only required to pay with interest whatever was due at the time the notice had been given, and the royalties on coal which had been actually mined after the date of the demand and before suit brought, with interest, when a tender had been made.³⁸

§233. Waiver — parol evidence.

In an action to recover rent or royalties due under a written lease for a year, parol evidence was held admissible to show a written waiver of such rent or royalty.³⁹

§234. Surrender — tract "retained."

A lease covered several tracts of land. It provided that in the event any tract failed to yield the lessor a certain royalty, the lessee should pay a certain named rental upon each tract "retained." It was held that the word "retained" referred

³⁷ Union Oil Company's Appeal, 3 Penny. (Pa.) 504. The court refused to apply the rule applicable to stocks in an instance of a refusal to deliver.

³⁸ West Ridge Coal Co. v. Van

Storch, 5 Lack. Leg. N. 189; 7 Del. Co. Rep. 467.

³⁹ Crawford v. Bellevue, etc., Gas Co., 183 Pa. St. 227; 38 Atl. Rep. 595; Wilgus v. Whitehead, 89 Pa. St. 131.

to the right to operate, which right continued so long as the lessee had made no formal surrender.⁴⁰

§235. Interdependent conditions.

A lessor was to receive one-eighth of all oil produced under a lease. Subsequently he and the lessee entered into a written supplemental contract in reference to an existing oil well then on the farm, in which it was agreed that if it should produce a daily average of five barrels of oil for thirty days, the lessee should pay the lessor \$250; if ten barrels, \$500; "should the second well provided for in lease in like manner produce fifteen barrels, the lessee to pay the lessor the further sum of \$1,000. Explanations: The understanding and agreement in regard to the test well being that plaintiff is in no event to receive exceeding the sum of \$500." The first well, being old ceased to produce oil; but the second produced more than fifteen barrels for thirty days. The lessee claimed that the words "in like manner" and "further" showed that the sum to be paid upon the production of the second well was dependent upon the production of the first, and as that had failed, nothing was payable on the second. But the court held that the sums to be paid were in the nature of a bonus, to be paid upon the production of the wells, and that the lessee was bound for the payment on the second well, though the first produced nothing.⁴¹

§236. New lease.

If the lessor give the lessee a new lease for the premises, it will amount to a surrender of the old one if the lessee accept it; and will release the lessee from his obligation to pay rental or royalties under the old lease from the date of the surrender, though not from those that had accrued at the time of its acceptance.⁴² In such an event, if the lessee has assigned the

⁴⁰ Jamestown, etc. Co. v. Egbert, 152 Pa. St. 53; 25 Atl. Rep. 151.

⁴¹ Brushwood Developing Co. v. Hickey (Pa.), 16 Atl. Rep. 70; 2 Mon. (Pa.) 65.

⁴² Smith v. Munhall, 139 Pa. St. 253; 21 Atl. Rep. 735; Meeker v. Browning, 9 Ohio C. D. 108; 17 Ohio C. C. Dec. 548.

lease, but a forfeiture had taken place before the assignment, though not declared until afterward, and the lessor give the lessee a new lease, its acceptance will be a surrender of the old one, depriving the assignee of all rights under it, but releasing him from thence on for the rents and royalties.⁴³

§237. Termination of lease by failure to keep its terms.

Although the right to declare a forfeiture of a lease is for the benefit of the lessor, and the lessee cannot avail himself of an actual forfeiture on his part, yet the lease may be so conditioned that a failure to keep the condition, even on the part of the lessee, will terminate its existence and relieve him from any liability, or any further liability, for rents or royalties. In such instances the life of the lease is made to depend upon the performance of the condition imposed. Thus where a grant was made of the oil, gas and minerals underlying a certain tract of land, on the condition that the grantor was to have a certain portion of the product mined; and the deed provided that if no well was completed within a certain period of time from its date, the grant should be null and void, unless the grantee should pay the grantor a specified rental for each year the completion of the well was delayed, and it was also stipulated that the grantee might surrender the lease at any time by paying the rental on the land to the time of the surrender, it was held, in as much as it was optional with the grantee as to whether he would do anything, and as no well had been drilled, there was no obligation resting upon him to pay any rent, or to make compensation for oil or gas.⁴⁴ Where an oil or gas lease was given for a period of twenty years; and if gas was found in sufficient quantities, and was used, there should be paid five hundred dollars per annum for each well drilled; one well was to be completed within six months, and if it was not, then the lessee was to pay a certain sum per annum in full for

⁴³ *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. Rep. 951.

⁴⁴ *Brooks v. Kunkle*, 24 Ind. App.

624; 57 N. E. Rep. 260. See *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820.

such yearly delay, until the well was completed; and a failure to complete within that period, or pay such rental, rendered the lease void; and if neither gas nor oil was found on the property within two years from the date of the lease, then the lease was "to expire and be of no effect"; and the lessee permanently ceased to use a gas well drilled on the premises before the expiration of the twenty years for the reason that the gas supply was exhausted, it was held that he was not liable for the annual rent after so ceasing to use the premises.⁴⁵ Where a lease contained no covenant to pay rent or develop the premises, merely providing that it should become null and void, and all rights cease, unless a well should be completed on the premises within a month, or unless rent be paid in advance at a certain rate per month, it was held that the lessee was under no obligation to continue his explorations, and was under no obligation to pay rent.⁴⁶

§238. Lessee cannot avoid payment by taking advantage of forfeiture clause.

It is a trite rule of law that a man cannot take advantage of his own default to avoid liability. Nor can he take advantage of his default in the development of leased property to avoid payment of rent. Where a twenty-year lease provided that if a well was not commenced within three months, the lessee should, after that period, pay a certain monthly rental until the work was commenced; and a clause provided that in no case should the commencement of the well be delayed beyond six months, and if no well was begun within that period, the lease should be forfeited; it was held that the clause of forfeiture was for the benefit of the lessor, and until he elected to enforce it, the lessee's liability to pay rent continued.⁴⁷ A stronger case arose

⁴⁵ Williams v. Guffey, 178 Pa. St. 342; 35 Atl. Rep. 875.

⁴⁶ Glasgow v. Chartiers Gas Co., 152 Pa. St. 48; 25 Atl. Rep. 232; *contra*, Chamberlain v. Parker, 45 N. Y. 569. See Diamond Plate Glass

Co. v. Curless, 22 Ind. App. 346; 52 N. E. Rep. 782.

⁴⁷ Matthews v. People's, etc., Gas Co., 179 Pa. St. 165; 39 W. N. C. 544; 36 Atl. Rep. 216; Brown v. Vandergrift, 80 Pa. St. 142.

in the same State. It was provided in a lease, among other things, that if the lessee did not pay rent within ten days after it was due the lease should be void, and neither party, after such failure, should have a right of action by reason of the breach. It was held that the lessee could not relieve himself from liability for the rent, or prevent the lessor from maintaining an action therefor, by making default in its payment.⁴⁸ So where a lease provided that if the lessee failed to complete a well within a month he should, after that time, pay a certain rental, until a well was completed; and that a failure to complete a well or pay the rental should annul the lease, the "lessee having the option to drill said well or not, or pay said rental or not, as he may elect," it was held that he must drill a well or pay the rent, and that he could not avoid the liability by refusing to do either.⁴⁹ But where the lessee was to deliver a part of the oil and pay a certain sum for gas, and the lease was to be null and void unless a well was completed within a year, or unless the lessee paid a certain amount quarterly in advance for each additional three months the completion of well was delayed, it was held that the lease did not bind the lessee to pay any rent for the land or for delay in commencing to bore for oil or gas, as the only consequence that could result from his failure would be a forfeiture of the lease.⁵⁰

§239. Forfeiture clauses and liability for rent.

A twenty-year lease required operations to be begun in ninety days, to be prosecuted diligently and continuously, and a well to be completed by a certain date. Failure to do so rendered the lessee liable for an annual sum, payable quarterly in advance. No work was done, but the first quarter was paid voluntarily, and a judgment recovered for the second quarter, which was paid; and an action was brought to recover for the third

⁴⁸ Cogle v. National, etc., Co., 165 Pa. St. 561; 30 Atl. Rep. 1038; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. Rep. 95.

⁴⁹ Jackson v. O'Hara, 183 Pa. St. 233; 38 Atl. Rep. 624.

⁵⁰ Snodgrass v. South Penn. Oil Co., 47 W. Va. 509; 35 S. E. Rep. 820; Glasgow v. Chartiers Gas Co., 152 Pa. St. 48; 25 Atl. Rep. 232; affirming Glasgow v. Griffith, 22 Pittsb. L. J. (N. S.) 181.

and fourth quarters, to which the lessee set up as a defense the clause in the lease providing that if he failed to perform all the covenants of the lease, such failure to perform, or breach of the covenants, should "work an absolute forfeiture of" the grant. It was held that this was no defense; for the reason that only the lessor could take advantage of the violation of its provisions.⁵¹ And where the clause was that a failure to complete a well within the time and place described should "render the lease null and void, and to remain without any force and effect between the parties," a similar ruling was made.⁵² In another case the lease provided that work should begin within sixty days, and a well be completed within three months after commencing it. If there was a failure to complete a well, the lessee was to pay the lessor for such delay one thousand dollars annually within three months after a well was completed. It was also especially provided that a failure to complete one well or to make such payment within the time specified should render the lease null and void, and to remain without effect between the lessor and lessee. The lessee neither drilled a well nor paid any sum of money. The lessee, when sued for a breach of the covenants of the lease, claimed that his failure to keep them avoided the lease from the beginning, and therefore he was not bound by them; but the court held that no such construction should be given to the lease, and that he could not set up his own default as a defense.⁵³ A like ruling was made where the lease provided that a failure to keep its covenants on the part of the lessee should "render the agreement null and void," and no right of action should after such failure accrue to either party on account of the breach of any promise or agreement" contained in it.⁵⁴ Even where a lease provided it should be void and of no force and effect without the consent of both the lessor and lessee, it was considered that it was for the lessor to

⁵¹ *Wills v. Manufacturing, etc., Co.*, 130 Pa. St. 222; 18 Atl. Rep. 721; 5 L. R. A. 603.

⁵² *Ray v. Western, etc., Co.*, 138 Pa. St. 576; 20 Atl. Rep. 1065; 12 L. R. A. 290; *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219.

⁵³ *Galey v. Kellerman*, 123 Pa. St. 491; 16 Atl. Rep. 474.

⁵⁴ *Ogden v. Hatry*, 145 Pa. St. 640; 23 Atl. Rep. 334; *Leatherman v. Oliver*, 151 Pa. St. 646; 25 Atl. Rep. 309.

declare a forfeiture and not the lessee, and unless the former did declare one, the latter was bound.⁵⁵

§240. Surrender of lease necessary to escape liability for rent.

So long as a lessee holds possession of the leased premises under the lease, he must pay rent, even though the lease provide that in a certain event it was to be null and void. Thus, where the term of a coal lease was to end when the workable coal on it was exhausted, but it gave the lessee the use of a part of the demised premises, in connection with mining of coal on adjoining land, the lessee was required to pay the minimum rent provided for in the lease, so long as he retained possession for any purpose under it, although the coal had been exhausted.⁵⁶ And if the lease provide that its surrender should release the lessee from all its covenants and for money due, yet he will not be released by the surrender unless he pay all rents due up to the time he gives up such lease; ⁵⁷ for such a provision applies only to future rent, and not to rent due at the time of the surrender.⁵⁸ Where rent was to be paid if no well was completed within the first year, a surrender at the end of the first ten months of the year did not relieve the lessee for the year's rent.⁵⁹

⁵⁵ *Phillips v. Vandergrift*, 146 Pa. St. 357; 23 Atl. Rep. 347; *Jackson v. O'Hara*, 183 Pa. St. 233; 38 Atl. Rep. 624.

⁵⁶ *Lennox v. Vandalia Coal Co.*, 66 Mo. App. 560; 158 Mo. 473; 59 S. W. Rep. 242; *Roberts v. Bettman*, 45 W. Va. 143; 30 S. E. Rep. 95.

⁵⁷ *Douthett v. Gibson*, 11 Pa. Sup. Ct. Rep. 543; *Aderhold v. Oil Well Supply Co.*, 158 Pa. St. 401; 28 Atl. Rep. 22.

⁵⁸ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Bettman v. Shadle*, 22 Ind. App. 542; 53 N. E. Rep. 662; *Columbian Oil*

Co. v. Blake, 13 Ind. App. 680; 42 N. E. Rep. 234; *Smiley v. Western, etc., Co.*, 138 Pa. St. 576; 21 Atl. Rep. 1; *Leatherman v. Oliver*, 151 Pa. St. 646; 25 Atl. Rep. 309; *Ogden v. Hatry*, 145 Pa. St. 640; 23 Atl. Rep. 334.

⁵⁹ *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

Whether a surrender can be made by answer to a complaint to recover royalties due arose in *Bettman v. Shadle*, *supra*, but was not decided. See also *Douthett v. Gibson*, 11 Pa. Sup. Ct. Rep. 543, where a surrender was made after suit brought, but full rent recovered.

§241. Eviction.

If the lessor convey the leased premises, without any reservation of the lessee's right to enter and drill for oil or gas, his act will be a constructive eviction, which will terminate the lessee's liability for rent.⁶⁰ Eviction by the lessor, of course, terminates the lease.⁶¹ But where the eviction is by another, the usual rules with regard to the rights of landlord and tenant prevail. If there be a covenant for quiet enjoyment, either implied or expressed, and the lessee be evicted by a stranger, he will not be liable for rent, thereafter at least.⁶² Where the owner of coal land sold the coal underneath it, reserving to himself the right to drill three oil wells on the premises, and then leased the land above the coal for oil purposes; and the lessee, to avoid litigation with the purchasers of the coal, who denied his right to drill the wells, paid them a certain sum, it was held that, though the lease contained words of grant, this did not imply a covenant for quiet enjoyment, since the lease was a mere right to operate, and that the act of the lessee in compromising with the coal owners was no defense to a suit for the amount due under the lease.⁶³

§242. Rent to be paid if well not drilled.

It is a very common clause in oil or gas leases that if a well be not dug, or if it be not dug by a certain time, then rent for the tract leased shall be paid, either after a certain time, or from the date of the lease if the well be not dug by a certain date. Thus where a lease provided that the lessee should have the right to enter on certain described premises, drill and

⁶⁰ Mathews v. People's Natural Gas Co., 179 Pa. St. 165; 39 W. N. C. 544; 36 Atl. Rep. 216. What is not an eviction, see Tiley v. Moyers, 43 Pa. St. 404.

⁶¹ Miller v. Michel, 13 Ind. App. 190; 41 N. E. Rep. 467.

⁶² Noke's Case, 4 Rep. 80 b. Cro. Eliz. 674. If the covenant is only for a quiet enjoyment as against the

lessor, see Line v. Stephenson, 5 Bing. N. C. 183; 7 L. J. C. P. 263; 7 Scott 69; 1 Arn. 385; Merrill v. Frame, 4 Taunt. 329.

⁶³ Chambers v. Smith, 183 Pa. St. 122; 38 Atl. Rep. 522. For an eviction the lessee has an action for damages. Hoosac Mining, etc., Co. v. Donat, 10 Co'o. 529; 16 Pac. Rep. 157.

operate for oil and gas, erect buildings and lay all necessary pipes for the production and transportation of them from the premises, reserving a certain portion of the gas and oil, but provided that the lessor leased "one acre anywhere out of the above described tract for a test well, and, if oil or gas is found, then" the lessee "has the balance of the above land to drill at the same royalty as the within lease," upon the condition that if gas only be found the lessor should receive one hundred dollars for "each well"; and the lessee was to commence operations within thirty days from the date of the lease, and failing to do so, to pay the lessor annually five dollars per acre until a well was completed; it was held that the right granted was absolute to take all the gas and oil under the entire tract, and failing to make the test well, five dollars per acre was to be annually paid the lessor.⁶⁴ Where the well was to be dug within six months, and on failure to do so, a rent of five hundred dollars a year was to be paid until the well was completed, but the tenant had the right to protect himself from "further payments or liabilities" accruing under the lease, by a surrender of it, it was held that a surrender made eighteen months after its date did not release the lessee from the five hundred dollars' rent for the previous year.⁶⁵ Where a lease provided for a certain annual rental, payable quarterly, for the product of each well, and reserving a right in the lessee to put an end to the lease by a reconveyance, it was held that the liability for gas used off the premises was not limited to the period of time when gas was actually used, but if gas was used when the year commenced the whole amount for that year then became due and payable, even though the gas was not used for the entire year.⁶⁶ If a lease provide for a periodical rental until a well be completed, or until the expiration of a certain fixed term, the lessee is bound to pay the rental, even though he does not within such term enter on the land and complete a well, unless

⁶⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234. Co., 158 Pa. St. 401; 33 W. N. C. 336; 28 Atl. Rep. 22.

⁶⁵ *Aderhold v. Oil Well Supply Co.*, 30 Pittsb. L. J. (N. S.) 281. ⁶⁶ *Coulter v. Conemaugh Gas Co.*, 30 Pittsb. L. J. (N. S.) 281.

the lessor prevent him from doing so.⁶⁷ A provision, in instances of the kind given above, that the surrender of the lease shall be a satisfaction of all damages between the lessor and lessee applies only to future rent, and not to rent due at the time of the surrender.⁶⁸ So where the lease contained a provision that it should bind the assignee, and provided that a well should be completed within a year, or, on default the lessee pay "for further delay a yearly rental" until the well was completed, it was held that one becoming the owner of a one-half interest soon after the lease was executed, and shortly after the expiration of the first year becoming, by assignment from the original lessee of the remaining interest, the sole owner of the lease, was liable for the rent due for the second year, the well not having been completed.⁶⁹ A lease provided that the lessee should have the right to drill for gas in three tracts of land out of a one hundred-acre tract, and bound the lessor not to grant any other person the right to drill on this one hundred-acre tract. The lessee agreed to furnish gas for a dwelling house and the lease as long as the lease was in force, to pay one hundred dollars annual rental for each well, pay a like amount a year until a well should be drilled; and to drill one well by a certain date, and pay for it whether drilled or not. Whenever gas ceased to be used generally for manufacturing purposes in the county, the lease was to terminate. It was held that the lessee was bound to drill at least one well, and, failing to do so, he must pay one hundred dollars yearly and supply gas for the dwelling house, for the reason that, during the continuance of the lease, the lessor and his grantees or assigns, could not drill or permit any one to drill on the one hundred-acre tract.⁷⁰ So where a well was to be put down by a certain time, or thereafter the lessee must pay the lessor a certain sum annually until a well was completed, it was held that it was no excuse for the lessee that "soon" after the lease was executed

⁶⁷ *Lawson v. Kirchner*, 50 W. Va. 344; 40 S. E. Rep. 344.

⁶⁸ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196.

⁶⁹ *Breckenridge v. Parrott*, 15 Ind. App. 411; 44 N. E. Rep. 66.

⁷⁰ *Simpson v. Pittsburgh, etc., Co.*, 28 Ind. App. 343; 62 N. E. Rep. 753.

it was discovered that the territory was worthless for gas or oil, and for that reason the well was not completed. The lessee was compelled to pay the annual rent.⁷¹ Where a stipulated sum was to be annually paid if there was delay in completing a well, and no date was fixed when the rent should be paid, it was held that it fell due by operation of law at the end of each year.⁷²

§243. **Minimum production allowed.**

In instances of mining leases there is often a requirement that not less than a certain amount of ore shall be mined and so much royalty per bushel or ton paid annually; and if less than the amount be mined, yet the gross amount of royalty shall be the same as if the requisite amount had been mined; and if more than the requisite amount, then the gross sum of royalties shall be increased by the surplus bushels or tonnage. In an instance of this kind, where the lessor had the power to terminate the lease if the lessee should not be able to find sufficient ore, it was held that until the lease was terminated by the lessor, the lessee continued liable for the least annual sum provided for by the lease.⁷³ Occasionally leases of this character allow the surplus in one year to be applied to the deficiency arising in another, in which event it is not necessary for the deficiency to occur before the excess is produced, and an excess paid for in one year may be applied to the deficiency of a subsequent year.⁷⁴ Where mining works are closed a part of the year, without the lessee's fault, he must pay an amount of the minimum royalty bearing the same proportion to the whole that

⁷¹ *Springer v. Citizens' Natural Gas Co.*, 145 Pa. St. 430; 22 Atl. Rep. 986.

⁷² *Lynch v. Versailles Gas Co.*, 165 Pa. St. 518; 30 Atl. Rep. 984. See also *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161; 36 Ohio Wkly. L. Bull. 231; 44 N. E. Rep. 1093; 34 L. R. A. 62, where it was held that the sum recoverable was rentals as such, and the lessor was

not limited to a recovery of liquidated damages.

⁷³ *Lehigh Zinc and Iron Co. v. Bamford*, 150 U. S. 665; 14 Sup. Ct. Rep. 219, affirming 33 Fed. Rep. 677. This rental was payable annually, and not postponed to the end of the term.

⁷⁴ *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264; 11 N. E. Rep. 645.

the part of the year mining operations were carried on bears to the whole year.⁷⁵ In an instance of the kind under discussion, where the lease provided for the payment of a certain sum per month as the minimum amount of royalty, even though no coal were mined, the minimum royalty was regarded as liquidated damages, and not as a penalty.⁷⁶

§244. Consideration for lease may be purchase money.

The consideration of a lease or an instrument giving a right to take mineral, oil or gas from the premises, may not be rent at all, but purchase money for the mineral or oil taken out of the earth. Thus where the owner of land sold all the mineral under it, granting to the vendee the right to enter on the premises and dig, explore therein, and occupy them with all necessary structures, and mine and remove all coal, paying to the vendor a certain price per ton of coal removed, payable quarterly, it was held that the stipulated price was purchase money of the real estate, not of the mineral removed, for which the vendor had a lien on the coal not mined and removed, the payment of so much per ton being only a mode of determining the amount of the purchase money to be paid.⁷⁷ So a lease of all the coal in a certain tract of land until it should all be mined and removed, the consideration being the payment of a royalty and also an annual minimum rental, whether coal was mined or not, and providing for a forfeiture, was held to be a sale of the coal and

⁷⁵ *Coaldale, etc., Co. v. Clark*, 43 W. Va. 84; 27 S. E. Rep. 294.

⁷⁶ *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 37 N. E. Rep. 937.

⁷⁷ *Manning v. Frazier*, 96 Ill. 279; *Fairchild v. Fairchild* (Pa.), 9 Atl. Rep. 255; *Duff's Appeal*, 21 W. N. C. (Pa.) 491; *Hatherton v. Bradbourne*, 13 Sim. 599; 13 L. J. Ch. 171; 7 Jur. 1100; *Taylor v. Evans*, 1 H. and N. 101; 25 L. J. Exch. 269; *Foley v. Fletcher*, 3 H. and N. 779; 2 L. J. Exch. 100; 5 Jur. (N.

S.) 342; 7 W. R. 141; 33 L. T. 11; *Hope's Appeal* (Pa.), 3 Atl. Rep. 23; 2 Cent. Rep. 43; 29 W. N. C. 365; *Lazarus' Est.*, 145 Pa. St. 1; 29 W. N. C. 36; *Hancock's Est.*, 7 Kulp. 36; *Kingsley v. Hillside Coal Co.*, 144 Pa. St. 613; 29 W. N. C. 368; 23 Atl. Rep. 253; *Finnegan v. Pennsylvania Trust Co.*, 144 Pa. St. 613; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583; 1 Atl. Rep. 394.

the rental and royalty purchase money; but a failure to pay the rent ended the lease.⁷⁸

§245. Consideration for grant part of minerals, creates an exception.

It will readily be observed that when the grantor or lessor reserves a part of the minerals, oil or gas mined or taken out of the earth, such mineral, oil or gas thus reserved cannot be said to be strictly "rent," within the meaning of the definition of that term as applied to letting land generally, for it is not a profit issuing out of the land, but a part of the land itself. It is in fact neither a rent nor a reservation, but an exception. The interest in the part reserved or retained never passes out of the lessor, but remains in him.⁷⁹ Thus a wife, and her husband conveyed real estate in fee simple by deed, reserving by recital to themselves, and did not convey by the deed, the equal one-half part of the usual royalty of one-eighth of all the oil underlying the tract. The grantee then leased the premises, giving the exclusive right to drill and operate for oil and gas, reserving one-eighth of all the oil obtained as produced in the crude state. It was held that the recital in the lease was a reservation to the grantee (or lessor) of one-eighth of the oil which had vested in him, and not of the one-sixteenth which was outstanding in the wife. It was considered that he had not reserved any part of the oil which was considered to be vested in the wife.⁸⁰

§246. One well draining two tracts of land.

The owners of two separate tracts made a joint lease of them. The lessee drilled a well only on one tract, but this well drained the other tract. It was held that the owner of the tract on

⁷⁸ *Lehigh, etc., Co. v. Wright*, 177 Pa. St. 387; 35 Atl. Rep. 219; *Lehigh, etc., Co. v. Wilkesbarre, etc., Co.*, 8 Kulp. (Pa.) 540. But see *Barrs v. Lea*, 33 L. J. Ch. 437.

⁷⁹ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559; *Busbey v. Russell*, 18 Ohio Cir. Ct. Rep. 12; 10 Ohio C. D. 23.

⁸⁰ *Harris v. Cobb*, *supra*.

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which the well was drilled was not entitled to a royalty on all the oil produced through the well, on the theory of confusion of goods; but was entitled to an amount equal to the area his land bore to the entire area of the two tracts.⁸¹ Where a lessee took a separate lease for oil on A and B tracts, which adjoined each other, and then, drilling a well on tract A near the line between the two, by agreement of all concerned, he gave notice to the owner of tract B on which he had drilled no well, that if the well drilled on tract A proved to be a paying well, he would put down another one on tract B near the line as an offset; and this was done. It was held that he did not have to account to the owner of tract A for the oil taken from the well on tract B.⁸²

§247. Oral change of lease discharging or changing rents.

A written lease, after its execution, may be so modified by parol as to discharge the lessee from all liability to pay rent that was due under it according to its written terms;⁸³ or the amount of the royalty may be reduced by parol. And if the reduction be made in order to induce the lessee to remain in possession, the reduction will be supported by a sufficient consideration to make it binding where it is acted upon and carried out for many years to the acceptance of all concerned, although the lessee might have been liable for damages if he had refused to carry out the original lease.⁸⁴

§248. Failure of oil, royalty ceases.

If the oil is exhausted the royalty ceases, even though the engagement of the lessee is to pay during the term a royalty on so much oil whether produced or not. Thus where an iron

⁸¹ Kleppner v. Lemon, 198 Pa. St. 581; 48 Atl. Rep. 483.

⁸² Colgan v. Forest Oil Co., 194 Pa. St. 234; 75 Am. St. Rep. 695; 30 Pittsb. L. J. (N. S.) 213; 45 Atl. Rep. 119.

⁸³ Crawford v. Bellevue, etc., Gas Co., 183 Pa. St. 227; 38 Atl. Rep.

595. See Meeker v. Browning, 9 Ohio C. D. 108; 17 Ohio C. C. 548.

⁸⁴ Sargent v. Robertson, 17 Ind. App. 411; 46 N. E. Rep. 925; Monroe v. Perkins, 9 Pick. 298; Lattimore v. Harsen, 14 Johns. 330. See Hunter v. Apollo Oil and Gas Co. (Pa.), 54 Atl. Rep. 274.

mining lease was taken for a term of years, the lessee to mine annually such quantities of ore as would produce a stipulated sum of royalty, and if he did not mine it, pay the royalty any way, and the ore became exhausted before the end of the term — it was held that the obligation to pay royalty ceased with the exhaustion of the ore.⁸⁵

§249. Rent for exhausted well,— flooded well.

So thoroughly embedded in the law pertaining to the production of oil and gas is the idea that all liabilities and rights must turn upon a productive field or lease, that a failure of a gas or oil well may stop the accruing of periodical rent, even where the express language of the lease makes no reference to a cessure of payment in case the well should become exhausted. Thus where the lease was to run twenty years, and for each gas well a rent of five hundred dollars per annum was to be paid; and before the end of the second year the well, without fault of the operators, was flooded with salt water and ceased to produce gas, it was held that the third year's rent could not be collected, for the reason that there should be read into the lease this implied agreement or understanding that the well to be paid for at the stipulated price was not only to be a gas well but to remain a gas well, and that when it ceased to produce gas it ceased to be a gas well.⁸⁶

§250. Instances of lessee's liability.

A notice of an election on the part of the lessee of his determination to terminate the lease at the beginning of the next ensuing year will not relieve him from the payment of the rent for the current year; and where the lease began from a certain day, to run twenty-one years, on which day the lessee paid a

⁸⁵ *Hewitt Iron Mining Co. v. Des-sau Co.*, 129 Mich. —; 89 N. W. Rep. 365. See *Adams v. Stage*, 18 Pa. Super. Ct. 308.

⁸⁶ *McConnell v. Lawrence, etc.*, Gas Co., 30 Pittsb. L. J. (N. S.)

346. See also *Williams v. Guffey*, 178 Pa. St. 342; 35 Atl. Rep. 875, and *McKnight v. Manufacturers', etc., Gas Co.*, 146 Pa. St. 185; 23 Atl. Rep. 164; 28 Am. St. Rep. 790.

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year's rental, and on the same day one year thereafter he gave notice of his intention to terminate the lease, it was held that he was liable for a second year's rent, for upon that day a second year's rent was due and the notice not having been given until then, he was liable for it.⁸⁷ If the lessor neglect to demand rent for the lessee's failure to complete a well by a certain time, that will not defeat its collection thereafter.⁸⁸ Such action is not laches. Where the lessee is to receive so much per well so long as gas is sold off the premises, and the lessee desires to escape on the ground that gas has not been sold off the premises during the period for which the action is brought to recover rent, he must show, and he has the burden to do so, a legal excuse why gas has not been sold, to escape liability.⁸⁹ If the measure of his liability is to pay so long as the wells produce gas, and the flow ceases, he will be relieved from his liability; and if he was to pay an annual rental, and the flow ceased during the year, he will be liable to pay only such a portion of the yearly amount as the time the wells produced bears to the entire year.⁹⁰ A payment of an installment or installments when not liable, will not prevent the lessee setting up the invalidity of the lease for installments falling due thereafter.⁹¹ Somewhat at variance with the case given above is an Ohio case. A lease gave the right to operate for oil and gas, and if only gas was found, the lessee should pay a fixed sum per year for each well "while the same is being used off the premises," but contained no stipulation inconsistent therewith; it was held that the lessee was not liable to pay such sum for a gas well whose product was not so used, even though it might be used off the premises without loss to the lessee.⁹²

⁸⁷ Nesbit v. Godfrey, 155 Pa. St. 251; 25 Atl. Rep. 621.

⁸⁸ Pittsburgh Consolidated Coal Co. v. Greenlee, 164 Pa. St. 549; 30 Atl. Rep. 489.

⁸⁹ Iams v. Carnegie, etc., Co., 194 Pa. St. 72; 45 Atl. Rep. 54. See Ohio Oil Co. v. Lane, 59 Ohio St. 307; 52 N. E. Rep. 791, below.

⁹⁰ Moon v. Pittsburgh, etc., Co., 24 Ind. App. 34; 56 N. E. Rep. 108.

⁹¹ Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 132; 52 N. E. Rep. 168.

⁹² Ohio Oil Co. v. Lane, 59 Ohio St. 307; 52 N. E. Rep. 791; 40 Wkly. L. Bull. 404; 41 Wkly L. Bull. 121.

§251. Account rendered.

Where the lessee is to render to the lessor periodical accounts of the amount mined, and he renders such accounts and makes payments based thereon, which are received without objection, such accounts are conclusive on the lessor, in the absence of full and satisfactory evidence of fraud and mistake. They are regarded in the nature of settlements.⁹³

§252. How collected.

What kind of an action must be brought to recover rent or royalty due will depend on the circumstances of each particular case. Thus if the amount is dependent on the amount of oil or mineral taken out, a bill in equity will lie to compel an accounting by the lessee.⁹⁴ Where a lease was for the privilege to bore salt wells and manufacture salt, the rent being every twelfth barrel manufactured; and oil rose in the well, which the lessee converted to his own use, claiming a right to all of it, it was held that trover would not lie for the lessor to recover his share, for he had never had possession of any part of it; but his remedy was an action for an accounting.⁹⁵ If periodical payments are to be made of fixed amounts at specified times, then the action must be upon the covenants in the lease when it is under seal, which would be an action of debt or covenant.⁹⁶ If the lease be not under seal, or if the letting be an oral one, then an *assumpsit* lies where the amount is fixed and definite.⁹⁷ An

⁹³ *Sillingford v. Good*, 95 Pa. St. 25; *Drake v. Laco*, 157 Pa. St. 17; 27 Atl. Rep. 538.

If the rent is payable in bank in cash, payment by check drawn in favor of lessor and deposited in the bank, will operate as a payment. *Friend v. Mallory*, 52 W. Va. —; 43 S. E. Rep. 114.

⁹⁴ *Swearingen v. Steers*, 49 W. Va. 312; 38 S. E. Rep. 510; *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Clavering v. Westley*, 3 P. Wms. 402.

⁹⁵ *Kier v. Peterson*, 41 Pa. St. 357. See *National Transit Co. v. Weston*, 121 Pa. 485; 15 Atl. Rep. 569.

⁹⁶ *Richards v. Killam*, 10 Mass. 239; *Warren v. Ferdinand*, 9 Allen 357; *Codman v. Jenkins*, 14 Mass. 93; *Boston v. Binney*, 11 Pick. 1; *Burnham v. Roberts*, 103 Mass. 379; *Smiley v. McLauthlin*, 138 Mass. 303; *Miller v. Blow*, 68 Ill. 304; *York v. Jones*, 2 N. H. 454.

⁹⁷ *Wills v. Manufacturers', etc., Gas Co.*, 130 Pa. St. 222; 18 Atl.

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allegation, in a complaint to recover payments under a lease, that such payments were due and payable under its terms is a sufficient allegation that the lease is still in force.⁹⁸ Mere delay in bringing an action if it is not barred by the Statute of Limitations is no defense.⁹⁹

§253. Lien of royalty accruing during receivership.

If royalty accrue from an insolvent mining corporation during a receivership, it will be a first charge on the funds in the hands of the receiver.¹⁰⁰

§254. Assignment of lease does not carry oil in tank on premises.

A sale of a lease does not carry the oil pumped out and in the tank on the premises; and parol evidence is not admissible to show that it was intended by a sale of the lease to sell the oil that had been pumped from the well.¹⁰¹

Rep. 721; 5 L. R. A. 602. See *Brown v. Magorty*, 156 Mass. 209; 30 N. E. Rep. 1021.

⁹⁸ *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. Rep. 391.

A lessor reserving a lien on "all ore mined," for royalties, may recover, in an action of tort, of the lessee who not only fails to pay royalties, but sells the ore without reserving the lien. *Iron Duke Mine v. Braasted*, 112 Mich. 79; 70 N. W. Rep. 414.

⁹⁹ *Ahrns v. Chartiers Valley Gas*

Co., 188 Pa. St. 249; 41 Atl. Rep. 739.

In *Greenough's Appeal*, 9 Pa. St. 18, it was held that distress lay for royalty due from a coal mine. The rent was also considered a preferred claim. See also *Oram's Estate*, 5 Kulp. (Pa.) 423, and *Jones v. Strong*, 5 Kulp. (Pa.) 7.

¹⁰⁰ *Allison v. Coal Creek, etc., Co.* (Tenn.), 3 Pick. 60; 9 S. W. Rep. 226.

¹⁰¹ *McGuire v. Wright*, 18 W. Va. 507. See *Dresser v. Transportation Co.*, 8 W. Va. 553.

CHAPTER VIII.

WHO MAY MAKE A LEASE.

§255. Owner of land may grant.

§256. Infants.—Lunatics.

§257. Married women.

§258. Wife joining husband in lease.—Homestead.

§255. Owner of land may grant.

It is elementary to say that the owner of the fee simple of a tract of land may give a lease to bore for gas or oil upon it. He may do this as readily as he may sell the fee; and to discuss the matter farther would be a useless act.

§256. Infants.—Lunatics.

Gas and oil in land are a part of it, and an infant owning the land has no more power over them than he has over the fee simple of such land. They are minerals, a part of the land. He can no more grant a lease of the land to bore for oil or gas than he can grant a lease of the land for agricultural purposes, or convey the fee simple of it. A lease of the land for gas or oil purposes must be made by the infant's guardian, as in an instance of a lease of an infant's lands for coal mining.¹ In the case of a lunatic the lease must be executed by his committee.² Usually the court will authorize the execution of a lease, if it be shown that it would be for the benefit of the infant,³ or the lunatic.⁴ Where a statute requires the court to approve a con-

¹ Lyddal v. Clavering, Amb. 371, note; Tullit v. Tullit, Amb. 370. Stoughton's Appeal, 88 Pa. St. 198 (oil lease); Chamberlin v. Dow, 16 W. N. C. 532.

² *In re* Smith, L. R. 10 Ch. App. 79; 23 W. R. 297.

³ Camden v. Murrey, 16 Ch. Div. 161; 50 L. J. Ch. 282; 43 L. T. 661; 29 W. R. 190.

⁴ *Ex parte* Grinstone, Amb. 708; Oxenden v. Compton, 2 Ves. 69; *Ex parte* Tabbart, 6 Ves. 428.

veyance or lease of a ward's lands by his guardian, a lease for gas or oil must be approved by the court, or it will be void.⁵ Where a will gave seven-tenths of certain real estate to infants, subject to a life estate, giving power to appoint the life-tenant, it was held that the interest of the infants was a vested one; and that any judicial sale under a decree to which they were not parties, except by representation, was void. It was also held that neither the life-tenant nor the owners of the other three-tenths had any right to drill for gas or oil; and the fact that the grantee had expended large sums in developing the premises was not sufficient to estop the infant remaindermen from enjoining the purchaser or his grantee from taking oil or gas from the land. Nor was the fact that they had not made themselves parties to the suit, or that they knew other claimants to the land had been bought off, sufficient to estop them.⁶ Of course an infant's conveyance or lease is voidable, and not void;⁷ and the same is true of an insane person not adjudged insane and under guardianship.⁸ But a sale by the guardian, in case of insanity, without the approval of the court, where a statute requires an approval, is void, not voidable; and this is true of a guardian's lease of such land for oil purposes.⁹ A father cannot sell his children's land nor the mineral in it; and if he sell the land, although he give his children other lands in the lieu of those sold, the title of the land still remains vested in them, and they may recover from the purchaser the value of the minerals mined.¹⁰

§257. Married women.

A married woman can no more give a lease of her lands for gas, oil or mining purposes without her husband joining her

⁵ Stoughton's Appeal, *supra*.

⁶ Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; 25 L. R. A. 222; Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694.

⁷ Engleberth v. Troxell, 40 Neb. 195; 58 N. W. Rep. 852; Cole v. Pennoyer, 14 Ill. 158.

⁸ Riggan v. Green, 80 N. C. 236;

Crouse v. Holdman, 19 Ind. 30.

⁹ South Penn. Oil Co. v. McIntire, 44 W. Va. 296; 28 S. E. Rep. 922; Stoughton's Appeal, 88 Pa. St. 193.

¹⁰ Keyes v. Pittsburgh, etc., Co. 58 Ohio St. 246; 50 N. E. Rep. 911; 41 L. R. A. 681.

than she can convey such lands without her husband joining in the conveyance. In the case of a deed, the separate deed of the wife is void;¹¹ and to make conveyance of her land valid her husband must join with her in the deed of conveyance; the title cannot be conveyed by their separate deeds.¹² The deed must conform with the law of the State where the land lies or it will be void.¹³ The same rules apply to a married woman executing a lease on her lands for oil or gas purposes. Thus where all the disabilities of a married woman were canceled by a statute, it being provided that "all the rents, issues, income and profits" of her real estate should "be and remain her own separate property, under her control, the same as if she were unmarried"; but it was also provided that a married woman should have no power to convey or encumber her property without her husband joined her in the deed of conveyance or in the instrument placing an incumbrance on her land, it was held that her contract conveying all the oil or gas on a certain named tract of land, and giving the right to enter on the premises at all times for the purpose of drilling and operating for oil or gas, and to erect and maintain all necessary structures, and lay all pipes necessary for the production and transportation of oil and gas taken from the premises, was void. This lease was void, because the husband of the owner had not joined her in its execution. "While oil and gas," said the court, "remain in the earth within their natural reservoirs or pockets they are parts of the realty itself as much as are stone, coal, lead or iron or any other solid or substantive mineral, and the sale of the real estate carries with it the ownership to all that lies beneath the soil, which, in case it be stone, coal, lead or iron, vests in the purchaser the absolute ownership therein, while, if there is water, oil or gas in or on the land the purchaser's ownership is absolute so long as it remains in or on his land, but when it escapes therefrom

¹¹ *Kinnaman v. Pyle*, 44 Ind. 275; *Mettler v. Miller*, 129 Ill. 630; 22 N. E. Rep. 529; *Central Land Co. v. Laidley*, 32 W. Va. 134; 9 S. E. Rep. 61; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423.

¹² *Stull v. Harris*, 51 Ark. 294; 11 S. W. Rep. 104.

¹³ *Glidden v. Strupler*, 52 Pa. St. 400; *Central Land Co. v. Laidley*, *supra*; *Leftwich v. Neal*, 7 W. Va. 569.

it is lost. In this view of the case, if the appellee could sell the gas or oil which might be found in or under her real estate without her husband joining with her, she could also sell the stone, coal, lead and iron which might be found there, or even the soil itself, thus, if not parting with, in fact destroying, the real estate itself. But if we were to hold the gas and oil found beneath the soil is not a part of the land itself the result in this case must be the same, for under the terms of this contract the appellant had the right to go upon the premises not only to sink gas and oil wells, but also to erect and maintain thereon 'all buildings and structures and lay all pipes necessary for the production and transportation of oil taken from said premises.' These rights are of necessity exclusive in their nature and would vest in the appellant rights in the property or real estate itself, and, if valid, might be enforced to the exclusion of the appellee. The statute especially withholds from married women the right in any manner to encumber or convey away their separate real estate except their husbands join with them." It was further held, that inasmuch as her lease was void, she could not encumber it against her lessee, the lease binding neither the lessor nor the lessee.¹⁴ In that State an ordinary lease of agricultural lands, for the purpose of cultivation, although carrying an interest in land, has been held not to fall within the inhibition of the statute quoted above.¹⁵ And in a case by the Supreme Court of that State, decided after the case was decided by the Appellate Court of the same State from which the quotation above was made,¹⁶ it was held that a married woman could execute, without her husband joining, a lease on her land for the purpose of operating on it a gas or oil well, it not being an encumbrance or conveyance of the land within the meaning of the statute prohibiting a married woman incumbering or conveying her land

¹⁴ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; 42 N. E. Rep. 234.

¹⁵ *Pearcy v. Henley*, 82 Ind. 129; *Nash v. Berkmeir*, 83 Ind. 536. See *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749.

¹⁶ The jurisdiction of the two courts depends, in civil cases, upon

the amount involved, and in rare instances an appeal lies from the Appellate to the Supreme Court. The former is bound by the law as declared by the latter, whether there is an appeal from one court to the other or not.

without her husband joining in the execution of the instrument of conveyance or incumbrance. "Leases of the character of the present," said the court, "differ from the ordinary agricultural lease, in that the former may carry a substantial and enduring interest in the freehold, while the latter vests but a transient and temporary interest, that of raising and removing crops. The former, however, in their primary effect, part with no immediate title or estate, and carry but right of exploration, any title or estate which may be contemplated remaining inchoate and of no effect until the oil or gas is found.¹⁷ For the purposes of prospecting, such leases involve a mere use, and part with no greater interest in the freehold than the ordinary agricultural lease. We have here no question of the effect of the instrument of Mrs. Swain to carry a freehold estate, the question being as to the validity of the lease to the appellees in vesting the exclusive right of prospecting or operating for gas and oil. For such purposes we do not doubt the power of Mrs. Swain to lease without her husband joining."¹⁸ It will be observed that the terms of the two leases drawn in question were different; and on this difference the cases may be reconciled. Where husband and wife owned lands as tenants in common, and the lessee, supposing that the husband owned the entire interest in them, took a lease of them, wherein he was to pay a certain rent or complete certain work by a fixed date, or rent where no operations were begun, and none were begun; and after the demand for rent the lessee ascertained that the wife had an interest in the premises, and he then demanded that the wife should join in the lease, to which the lessor assented, but he never secured his wife's signature; and the wife was present during all the negotiations for the lease, but never then or afterwards made objection; it was held that the lessee must pay the full amount of the rent.¹⁹

¹⁷ Citing *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. Rep. 732.

¹⁸ *Heal v. Niagara Oil Co.*, 150 Ind. 483; 50 N. E. Rep. 482.

¹⁹ *Kunkle v. People's, etc., Gas Co.*, 165 Pa. St. 133; 30 Atl. Rep. 719; 35 W. N. C. 465. See *Simmons v. Buckeye Supply Co.*, 21 Ohio Cir. Ct. Rep. 455; 11 Ohio C. D. 690.

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§258. Wife joining husband in lease — homestead.

A wife should join her husband in a lease of his lands; for upon his death, if she did not join him in its execution, she could assert her marital rights, to the probable injury of an existing lease on the land. So if a lease is made of the homestead, she should join in its execution, not only for the reason given, but for the reason that in those States requiring her consent to the transfer or encumbrance of the homestead to make the transfer or encumbrance valid the same consent is required in granting a lease for mining or oil purposes. Thus a lease of a homestead where such a statute prevails, granting the privilege for gas, oil, and other minerals at the lessee's pleasure, and to erect all derricks, engine houses, and buildings necessary in mining, excavating mines, and piping oil and gas, is such an alienation as to require the wife's signature, and if she does not sign it, the lease is void.²⁰ They must join in the same instrument, and cannot sign separate instruments so as to bind the land or either of them.²¹ A power of attorney authorizing a sale of the premises must be executed in the same way.²²

²⁰ *Franklin Land Co. v. Wea Gas and Coal Co.*, 43 Kan. 518; 23 Pac. Rep. 630; *Palmer Oil and Gas Co. v. Parish*, 61 Kan. 311; 59 Pac. Rep. 640. See *Pilcher v. Atchison*, etc., Ry. Co., 38 Kan. 516; 16 Pac. Rep. 945; *Evans v. Grand Rapids*, etc., Ry., 68 Mich. 602; 36 N. W. Rep. 687.

²¹ *Ott v. Sprague*, 27 Kan. 620; *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442; 38 Pac. Rep. 489; *Gage v. Wheeler*, 129 Ill. 197; 21 N. E. Rep. 1075.

²² *Wallace v. Travelers' Ins. Co.*, *supra*.

As to what will not be an aban-

donment of a homestead leased for gas, where husband and wife remove from it, because of its undesirability as a residence. See *Palmer Oil and Gas Co. v. Parish*, *supra*.

In Texas, where property was held as community property, and the lessor's husband represented to the defendants he would extend the time, and, on the faith of such representation, the defendants went on to expend moneys and carry out their part of the contract, the lessor was held bound by such waiver. *Presido Mining Co. v. Bullis (Tex.)*, 4 S. W. Rep. 860.

CHAPTER IX.

TENANTS FOR YEARS.

§259. May work open mines.

§260. When may open new mines.

§259. May work open mines.

Unless restricted by the terms of his lease, a tenant for years may work mines opened at the time his lease was granted; but he may not open new mines.¹ And if an owner of land upon which there is a mine opened, make a general lease of it, without any reference to the mine, the lessee has a right to work the mine for he has a lease of all the land, and it is intended that his interest is as general as his lease.²

§260. When may open new mines.

But the terms of the lease, though for years, may be such as to exclude the right to mine; or it may be such as to authorize the lessee to open new mines. Thus a demise for agricultural purposes only is such a limitation as to exclude the right of the lessee to take out stones from a quarry on the premises, although open at the time of the lease.³ And where the lease contained the following clause: "To have and to hold the above granted and demised premises, with every privilege, right and appurtenance whatsoever, to the said premises belonging or in any wise appertaining, whether ways, waters, water courses, mines, and

¹ Harlow v. Lake Superior, etc.,
Co., 36 Mich. 105; Shaw v. Wallace,
25 N. J. L. 455; Kier v. Peterson,
41 Pa. St. 361; Pennsylvania Salt
Co. v. Neel, 54 Pa. St. 9; Guffin v.
Fellows, 81½ Pa. St. 114.

² Owings v. Emery, 6 Gill. 260.
³ Freer v. Stotenbur, 2 Keyes 467;
2 Abb. Dec. 189; reversing 36 Barb.
641.

minerals of whatever description," it was held that he was entitled to open and work new mines. If there be a lease of land with the mines in it," said the court, "and there be no open mines, the lessee may dig for mines, otherwise the grant as to mines will not take effect." ⁴ If the land be leased for coal mining purposes, of course the lessee may open new mines and take out coal.⁵

⁴Griffin v. Fellows, 81½ Pa. St. 114; *contra*, Harlow v. Lake Superior, etc., Co., *supra*. Gartside v. Outley, 58 Ill. 210; Franklin Land Co. v. Wea Gas and Coal Co., 43 Kan. 518; 23 Pac. Rep.

⁵Heil v. Strong, 44 Pa. St. 264; 630.

CHAPTER X.

TENANCIES FOR LIFE.—DOWER.

- §261. May work mines or oil wells already open.
 - §262. Rule concerning life tenants applies to oil leases.
 - §263. May not open new mines or bore new wells.
 - §264. Curtesy estate of husband.
 - §265. When mines may be opened or wells bored.
 - §266. Mineral lands unfit for any other purposes than mining.
 - §267. Reversioner or remainderman opening wells.
 - §268. Life-tenant must account for waste.
 - §269. Title to mineral or oil severed.
 - §270. Destruction of *corpus* of the estate.
 - §271. Oil or gas may be exhausted.
 - §272. Estoppel of remainderman.
 - §273. Assignment of dower in mines.
- §261. May work mines or oil wells already open.

In an instance of coal and the like minerals, a tenant for life may work mines already opened, even to their exhaustion, carrying on the mining skillfully so as not to injure the inheritance; and he may even sink new shafts or wells to the vein already open. This is also true of a widow's dower. She has the right to work mines that were open at her husband's death, which have been assigned to her.¹ And the life tenant may

¹Lemfer v. Henke, 73 Ill. 405; Priddy v. Griffith, 150 Ill. 560; 37 N. E. Rep. 999; Hendrix v. McBeth, 61 Ind. 473; Elias v. Snowdon State Co., L. R. 4 App. Cas. 454; Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. 460; Kier v. Peterson, 41 Pa. St. 361; Seager v. McCabe, 92 Mich. 186; 52 N. W. Rep. 299; Campbell v. Wardlow, L. R. 8 App. Cas. 641; Reed v. Reed, 16 N. J. Eq. 248; Gaines v. Mining Co., 33 N. J. Eq. 603, reversing 32 N. J. Eq. 86; Coates v. Cheever, 1 Cow. 460; Rutland v. Gie, 1 Sid. 152; 1 Lev. 107; Neel v. Neel, 19 Pa. St. 323; Brooks v. Hanna, 19 Ohio C. Ct. Rep. 216; 10 Ohio Dec. 480; Irwin v. Covode, 24 Pa. St. 163; Lynn's Appeal, 31 Pa. St. 44; Westmoreland Co.'s Appeal, 85 Pa. St. 344; Eley's Appeal, 103 Pa. St. 300; Sayers v. Hoskinson, 110 Pa. St. 473; 1 Atl. Rep. 308; Fairchild v. Fairchild (Pa.), 9 Atl. Rep. 255; Woodburn's Est., 138 Pa. St. 606;

even penetrate through a seam already open to a new seam lying underneath the one penetrated.² And if the owner of an entire estate lease them for mining operations, and die, his widow is entitled to the royalty of a mine thereafter opened on the portion assigned to her under such lease, it being considered that the mine was practically opened at the owner's death.³ The life tenant may work mines once opened, although they have not been worked for many years before he acquired his life estate; but abandonment of the mine, for a day even, with the intention to devote the land to other purposes, will be fatal to the tenant.⁴ It is immaterial how the life estate has been created.⁵ And if a life estate be given in lands upon which mines are already leased, the life tenant will be entitled to the royalties accruing under the lease.⁶

§262. Rule concerning life tenant applies to oil leases.

The rule concerning the right of a life tenant to open new mines or work old ones applies to oil or gas wells upon the life estate. Thus where oil wells had been sunk, in the testator's life, under a lease, and one was being sunk when he died, it was held that the life-tenant was entitled to the royalties under the lease.⁷ But if no well has been sunk in the land owner's life time, his life-tenant cannot sink an oil well, nor lease the land;

² 21 Atl. Rep. 16; *Clift v. Clift*, 3 Pickle (Tenn.) 17; 9 S. W. Rep. 360; *Findlay v. Smith*, 6 Mumf. 134; 8 Am. Dec. 733. See *Gannon v. Petterson*, 193 Ill. 372; 62 N. E. Rep. 210.

³ *Crouch v. Puryear*, 1 Rand. 258.

⁴ *Priddy v. Griffith*, 150 Ill. 560; 37 N. E. Rep. 999.

⁵ *Gaines v. Green Pond Iron Mining Co.*, 33 N. J. Eq. 603, reversing 32 N. J. Eq. 86. See *Bogot v. Bogot*, 32 Beav. 509; *Stoughton v. Leigh*, 1 Taunt. 410; *Bartlett v. Phillips*, 4 De G. and J. 414; *Viner v. Vaughan*, 2 Beav. 466.

⁶ *Neel v. Neel*, 19 Pa. St. 323.

⁷ *Shoemaker's Appeal*, 106 Pa. St. 392; *Jones v. Strong*, 5 Kulp. 7.

The rule that the devisee of a life estate is entitled to work a mine already opened does not apply where there is no life estate, but a distribution of income in one proportion, and the *corpus* in another proportion. In such a case the royalty of a coal lease is part of the principal, and is not income. *Brooks v. Hanna*, 19 Ohio C. Ct. Rep. 216; 10 Ohio Dec. 480.

⁷ *Woodburn's Estate*, 138 Pa. St. 606; 21 Atl. Rep. 16; *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128.

and if he do lease it, he cannot recover the rent under the lease.⁸ The life-tenant cannot justify his conduct in boring oil or gas wells by claiming that if he did not take out the oil or gas the neighboring land owners will drain the land; for the oil or gas belongs to the remainderman.⁹ Where the owner of land, after leasing it for mining of oil and gas, conveyed it to his children, reserving to himself a life estate in it, it was held that he was entitled to the royalties under the lease.¹⁰

§263. **May not open new mines or bore new wells.**

A life tenant may not open new mines upon the life estate; for him to do so is waste,¹¹ even though, as in case of oil, it be necessary to secure it where adjoining land owners have opened wells on their own lands, and the effect is to draw the oil from the land in which the life estate exists.¹² If a stranger dig and carry away coal from land in possession of a life tenant, upon which no mine has been opened, the remainderman must bring the action to recover damages.¹³

§264. **Curtesy estate of husband.**

The right of a husband to royalties in his wife's land by reason of the estate in curtesy he holds, is the same as her dower

⁸ *Marshall v. Mellon*, 179 Pa. St. 371; 36 Atl. Rep. 201; 27 Pittsb. L. J. (N. S.) 214; 35 L. R. A. 816; 57 Am. St. Rep. 601; *Gerkins v. Kentucky Salt Co.*, 100 Ky. 734; 39 S. W. Rep. 444; *Gerkins v. Kentucky Salt Co. (Ky.)*, 36 S. W. Rep. 1; *Kenton Gas, etc., Co. v. Dorney*, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio C. Dec. 694; *Findlay v. Smith*, 6 Munf. 134; 8 Am. Dec. 733 (salt wells). See *Wilson v. Youst*, 43 W. Va. 826; 28 S. E. Rep. 781.

⁹ *Blakeley v. Marshall*, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694; *Childeers v. Neely*, 47 W. Va. 70; 34 S. E. Rep. 828; 40 L. R. A. 468. See also *Bettman v.*

Harness, 42 W. Va. 433; 26 S. E. Rep. 271.

¹⁰ *Koen v. Bartlett*, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128.

¹¹ *Priddy v. Griffiths*, 150 Ill. 560; 37 N. E. Rep. 999; *Coates v. Cheever*, 1 Cow. 460; *Whitfield v. Bewit*, 2 P. Wms. 240; *Clavering v. Clavering*, 2 P. Wms. 388; *Hook v. Garfield Coal Co.*, 112 Ia. 210; 83 N. W. Rep. 963.

¹² *Blakeley v. Marshall*, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; *Marshall v. Mellon*, 179 Pa. St. 371; 36 Atl. Rep. 201; 35 L. R. A. 816.

¹³ *Franklin Coal Co. v. McMillan*, 49 Md. 549. *Marshall v. Mellon supra.*

right in his lands.¹⁴ A tenant by curtesy cannot convey the right to a lease to extract oil from the land. Such a lease or grant is void.¹⁵

§265. When mines may be opened or wells bored.

There are circumstances under which a mine may be opened or a well dug, for the benefit of the life-tenant. These arise by reason of some act of the original owner. Thus where executors, under a power conferred by the will of their testator, executed a coal lease on the testator's land, it was held that the royalties received were income, distributable as such, and not as a part of the *corpus* of the estate. And it was also held that where the chief or sole value of lands is for coal mining, and the only profit to be derived from them is by sale or lease of the coal, which the executors may do, as they see fit, the executor may claim the royalties of a lease they make as income of the estate.¹⁶ The royalties, of course, eventually went to the life-tenants.¹⁷ Where land was valuable only as coal land, and the executors were to collect and give all the income of the estate to the testator's wife, and were given power to sell or lease the lands, as they thought best, it was held that the power to "lease" gave them power to lease the land for mining purposes, although no mine had ever been opened on them; and that the rental arising from such a lease went to the life-tenant as income.¹⁸ Where a testator bequeathed one-half of his residuary estate to his daughter, and directed the rest to be invested for her use

¹⁴ *Alderson v. Alderson*, 46 W. Va. 242; 33 S. E. Rep. 228; *Stoughton v. Leigh*, 1 Taunt. 410; 2 Inst. 299; *Sampson v. Grogan*, 21 R. I. 174; 42 Atl. Rep. 712; 44 L. R. A. 711.

Where there had been a demise of all the coal under the surface of a certain described tract of land, it was held to be a sale of the coal, and the amounts due from the lessee to the lessor as royalties were not rents, but the purchase money of real estate. Such royalty was held to be collectible by the legal representatives of the deceased owner

as personal property, was not profits of the real estate, and was not the subject of curtesy. *Fairchild v. Fairchild* (Pa.); 9 Atl. Rep. 255.

¹⁵ *Barnsdall v. Boley*, 119 Fed. Rep. 191.

¹⁶ *Reynolds v. Hanna*, 55 Fed. Rep. 783. See *Rankin's Appeal*, 1 Mong. 308 (Pa.), 2 L. R. A. 429.

¹⁷ *Eley's Appeal*, 103 Pa. St. 300 (a like case); *McClintock v. Dana*, 106 Pa. St. 386; *Shoemaker's Appeal*, 106 Pa. St. 392.

¹⁸ *Wentz's Appeal*, 106 Pa. St. 301.

during life, giving to his executors power "to sell and convert my estate into money, or to lease my coal interest," and to invest the proceeds of the coal lands so as produce a permanent revenue, the income from which was to be paid to the daughter; and after making his will he leased the land, receiving a royalty for the lease, it was held as this royalty was a part of the residuary estate one-half of it went to the daughter, and the other half must be invested for her use.¹⁹ So where husband and wife conveyed unopened coal lands to trustees, with power to "control, lease, demise, and to mine-let" such lands, and to collect and pay over to the wife the income from the same, with remainder over, it was held that at his death the trustees could grant a lease of the lands, and the income from the lease was payable to the wife.²⁰ So where the owner of land having on it a salt well provided by his will as follows: "During the life of my wife it is my intention and request that A, B and her do carry on my business in partnership, both salt works and merchandising, equal shares; and that in consideration of the use of my capital they pay out" certain named legacies, it was held that the life-tenants might sink new salt wells, even to the exhaustion of the salt veins; and that they had the right of wood, from the testator's wood land in an unlimited amount, to carry on the works which he had used for that purpose in his life time.²¹

§266. **Mineral lands unfit for any other purposes than mining.**

The rule that a life-tenant may not open a mine and work it upon the life estate, has been denied in cases where the lands were only fit for mining purposes.²² And it has been held that the rule not permitting a life-tenant to open new mines has no application to this country.²³

¹⁹ *Jones v. Strong*, 5 Kulp. 7.

²⁰ *Bedford's Appeal*, 126 Pa. St. 117; 17 Atl. Rep. 538.

²¹ *Findlay v. Smith*, 6 Munf. 134; 8 Am. Dec. 733.

²² *Wentz's Appeal*, 106 Pa. St. 301; *Reynolds v. Hanna*, 55 Fed. Rep. 783.

²³ *Seager v. McCabe*, 92 Mich. 186; 52 N. W. Rep. 299; 16 L. R. A. 247. This was a statutory life estate. See *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124; 67 N. W. Rep. 657; 32 L. R. A. 756; *Wilkinson v. Wilkinson*, 59 Wis. 557; 18 N. W. Rep. 528; *Melms v. Pabst*

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§267. Reversioner or remainderman opening wells.

The right of possession of land is in the life-tenant. The reversioner or remainderman has no right of possession as long as the life tenancy is in existence. He, therefore, has no right, without the consent of the life-tenant, to enter on the premises to sink oil or gas wells; and if he do, without such consent, the product of the wells will belong to the life-tenant, who may thereafter work them. By the severance of the oil or gas from the soil they become profits arising from the land; and as all profits belong to the life-tenant, he is entitled to take such oil or gas.²⁴

§268. Life-tenant must account for waste.

Inasmuch as the opening of mines or boring of oil and gas wells, and taking their product by the life-tenant from the soil is a waste, such tenant must account to the remaindermen, not on the basis of an annual rental but on the basis of rents and profits. And if there be several of the remaindermen, each is entitled to his share. And if the tenant for life is one of three tenants in the remainder, and he ousts his co-tenants in such remainder, claiming the entire title, he, having notice of their title, is not entitled to compensation for improvements he has made upon the land, under a statute allowing compensation to those who make improvements on land, under the belief that they have a good title. In such an instance when the remaindermen call for an accounting they must allow the life-tenant all the costs of production, which includes the cost of boring the well.²⁵

Brewing Co., 104 Wis. 7; 79 N. W. Rep. 738, and Disher v. Disher, 45 Neb. 100; 63 N. W. Rep. 368, which are other instances of statutory life estates, but not cases involving mines.

²⁴ Koen v. Bartlett, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128.

²⁵ Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694. See Williams v. Bolton, 3 P. Wms. 268; 1 Cox. Ch. Cas. 72; Foster v. Weaver, 118 Pa. St. 42; 12 Atl. Rep. 313; Ward v. Ward, 40 W. Va. 611; 21 S. E. Rep. 746; 29 L. R. A. 449; Effinger v. Hall, 81 Va. 94.

§269. Title to mineral or oil severed.

If the life-tenant open mines or bore oil or gas wells without right, the mineral, oil or gas taken out will belong to the remaindermen, the title thereto being in him.²⁶ By the severance they become personal property; and the remaindermen may replevin them from whomever may come into possession of them.²⁷

§270. Destruction of corpus of the estate.

The life-tenant has no right to destroy the *corpus* of the estate. Such is the case, as we have seen, where he opens new mines or bores new oil or gas wells; and what he may not do directly, he cannot do indirectly, as by giving the right to others by the way of lease or otherwise. And if he give a lease on undeveloped territory, he cannot collect the rent or royalty; for that belongs to the reversioner or remaindermen.²⁸

§271. Oil or gas may be exhausted.

No limitation can be placed upon the right of a life-tenant to use gas or oil wells, or mines, already bored or open; and the same is true if he had the right to bore wells or open mines. He may exhaust the oil or gas in the entire tract of land subject to the life estate, or all the ore that can be found in the mine; and the reversioner or remainderman cannot complain, although

²⁶ Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694.

²⁷ Omaha, etc., Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; Hughes v. United Pipe Lines, 119 N. Y. 423; 23 N. E. Rep. 1042.

²⁸ Marshall v. Mellon, 179 Pa. St. 371; 27 Pittsb. L. J. (N. S.) 214; 36 Atl. Rep. 201; 57 Am. St. Rep. 601; 36 L. R. A. 816; Gerkins v. Kentucky Salt Co., 100 Ky. 734; 39 S. W. Rep. 444; Gerkins v. Ken-

tucky Salt Co., 36 S. W. Rep. 1; Kenton Gas, etc., Co. v. Dorney, 17 Ohio Cir. Ct. Rep. 101; 9 Ohio C. Dec. 604; Woodburn's Est., 138 Pa. St. 606; 21 Atl. Rep. 16; Koen v. Bartlett, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; Blakeley v. Marshall, 174 Pa. St. 425; 34 Atl. Rep. 564; 38 W. N. C. 74; Williamson v. Jones, 43 W. Va. 562; 27 S. W. Rep. 411; 38 L. R. A. 694; Childers v. Neely, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468.

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thereby the land may be rendered practically worthless.²⁹ Nor is the life-tenant confined to the exact method pursued by the original grantor. Thus if such original owner used the gas or oil for his own use only, that does not prevent the life-tenant selling the gas or oil he pumps out.³⁰

§272. Estoppel of remainderman.

In rare instances a remainderman may be estopped in an attempt to restrain the taking of ore, gas or oil from the land in which he has a remainder. An instance arose in Kentucky, where the life-tenant gave a lease to bore for oil and gas upon land not theretofore developed. The lessee under this lease drilled a well at great expense, with the knowledge of some of the remaindermen, who would not be benefited by having the well closed. It was held that the lessee was entitled to be compensated for his improvements, that he might continue to work under the lease, but must pay the remaindermen a fair royalty for all salt water he took out after they had brought their action to restrain him.³¹

§273. Assignment of dower in mines.

In assigning dower there should be taken into consideration the value of the mines so far as opened during the husband's life, and the admeasures may, in their discretion assign the dower in lands by metes and bounds containing the mines or not, by directing a separate alternate enjoyment of the whole for periods proportioned to the share of the parties, or by giving the widow a part of the profits. But there can be no account taken of the mines opened since the death of the husband by his alienee, nor of the improvements made therein by such alienee.³²

²⁹ Koen v. Bartlett, 41 W. Va. 559; 23 S. E. Rep. 664; 31 L. R. A. 128; Shoemaker's Appeal, 106 Pa. St. 392; Sayers v. Hoskinson, 110 Pa. St. 473; 1 Atl. Rep. 308; Rankin's Appeal, 1 Mongahan (Pa.) 308; 2 L. R. A. 429.

³⁰ Neel v. Neel, 19 Pa. St. 323; Irwin v. Covode, 24 Pa. St. 162; Holman's Appeal, 24 Pa. St. 174.

³¹ Gerkins v. Kentucky Salt Co., 100 Ky. 734; 39 S. W. Rep. 444; Gerkins v. Kentucky Salt Co., 36 S. W. Rep. 1.

³² Coates v. Cheever, 1 Cow. 460. See Dicken v. Hamer, 1 Drew and Sm. 284; 39 L. J. Ch. 778; 2 L. T. 276; Stoughton v. Leigh, 1 Taunt. 402, 410.

“It is not necessary,” says a standard English authority, “that the widow should have a third or other proportion of each part of the estate; and if, therefore, the husband be possessed of divers mines, the sheriff may assign such a number of them as will amount to one-third in value of the whole;³³ and, in fact, the sheriff need not assign to her any mines at all — *scil*, because the widow’s part may consist wholly of surface lands set out by metes and bounds; or the sheriff may divide the profits of the mines between the parties, by directing, for example, the alternate enjoyment of the mines, or by giving the widow a part of the profits — especially where the mines are in the hands of the other persons.”³⁴ In a New Jersey case it was said: “The only question that can arise will be in regard to the mode of assignment, whether by metes and bounds or by a share of the profits. That course will be adopted which will be most favorable to the widow, and which will most effectually secure the enjoyment of her right. There can be no difficulty in taking an account of the profit. It appears from the answer that the clay banks have been worked in connection with the farm, thus the profits of the clay may be ascertained as well as of any other part of the property. Working banks is a mere mode of enjoyment.”³⁵

³³ Citing *Stoughton v. Leigh*, *supra*, p. 30, citing *Stoughton v. Leigh*, *supra*.

³⁴ *Bainbridge on Mines* (5th ed.), ³⁵ *Rockwell v. Morgan*, 2 *Beas.* (N. J.) Ch. 384.

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CHAPTER XI.

CO-TENANTS.

- §274. One co-tenant may operate land of co-tenancy for oil or gas.
- §275. Lease or license granted by co-tenant.
- §276. Partition of mines or mineral lands.
- §277. Partition of oil or gas lands.
- §278. Accounting between co-tenants.
- §279. Accounting when tenant excludes co-tenant.
- §280. Owner of surface not co-tenant with owner of mineral beneath surface.
- §281. Purchase by tenant of co-tenant's interest.
- §282. Equity jurisdiction of an accounting.
- §283. Expense of working joint property.
- §284. When a tenant bound by co-tenant's act.
- §285. Injunction.
- §286. Surrender of lease by co-tenant.
- §287. Payment of rent or royalties.
- §288. Fidelity relation between members of a mining partnership.

§274. One co-tenant may operate land of co-tenancy for oil or gas.

One co-tenant of land has the right himself to operate the land for oil or gas without the consent of his co-tenant; and this includes, of course, the right to sink wells and erect plants for that purpose. His fellow tenant cannot prevent his operating the joint property, by refusing to join him in the enterprise. This is true of coal or other ore lands;¹ and the same is true of oil or gas lands.²

¹ Coleman's Appeal, 62 Pa. St. 252, affirming 1 Pearson 470; Clowser v. Joplin Mining Co., reported in note to Bly v. United States, 4 Dill. 469; Marsh v. Holley, 42 Conn. 453; Huff v. McDonald, 22 Ga. 131; McCord v. Mining Co., 64 Cal. 134; Watson v. U. R. and G. Gravel Co., 50 Mo. App. 635; Kahn v. Old Telegraph Mining Co., 2 Utah 13; Blewett v. Coleman, 40 Pa. St. 45; Coleman v. Blewett, 43 Pa. S. 176;

Grubb's Appeal, 66 Pa. St. 117; Grubb v. Grubb, 74 Pa. St. 25; Grubb's Appeal, 90 Pa. St. 228; Fulmer's Appeal, 128 Pa. St. 24; 18 Atl. Rep. 493; *contra*, Childs v. Kansas City, etc., Co., 117 Mo. 414; 23 S. W. Rep. 373; Murray v. Haverty, 70 Ill. 318; Hook v. Garfield Coal Co., 112 Ia. 210; 83 N. W. Rep. 963.

² Williamson v. Jones, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R.

§275. Lease or license granted by co-tenant.

One co-tenant may grant a license or lease to dig in the joint property, but the right extends only to his interest;³ and if he takes out ore he must account to the other co-tenant for the value of his share of the mineral taken out, less the expense of digging and removing it from the mines.⁴ The tenant not joining in the license or lease is not bound to accept his share of the royalty reserved, but may insist upon an accounting by the licensee or lessee according to the rule just stated.⁵ The licensee or lessee of one tenant cannot be considered a trespasser as to the other tenant; for he simply succeeds to the right of possession in his licensor or lessor, who had a right of possession equal to that of his fellow tenant. Exclusion by the licensee or lessee of the other tenant might destroy his rights, in which event such licensee or lessee would not be required to account.⁶

§276. Partition of mines or mineral lands.

In a case of an attempted partition of a mine, Justice Brewer used the following language: "The mere fact of joint ownership in a mine does not give an equitable right to a partition. Seldom can a division of a mine be made. Generally partition must result in a sale. To such property there is an unknown value; and a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one

A. 222; *Enterprise, etc., Co. v. National Transit Co.*, 172 Pa. St. 421; 33 Atl. Rep. 687; *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; 35 Atl. Rep. 855; *Williams v. South Penn. Oil Co.*, 52 W. Va. —; 43 S. E. Rep. 214.

³ *Omaha, etc., Co. v. Tabor*, 13 Colo. 41; 21 Pac. Rep. 925; 5 L. R. A. 236; *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. Rep. 427; *Job v. Potton*, L. R. 20 Eq. 84; 44 L. J. Ch. 262; 23 W. R. 588; 32 L. T. 110.

⁴ *Tipping v. Robbins*, 64 Wis. 546;

25 N. W. Rep. 713; *Job v. Potton, supra*; *Gregg v. Roaring Springs, etc., Co. (Mo.)*, 70 S. W. Rep. 920.

⁵ *Job v. Potton, supra*.

⁶ *Denys v. Shuckburgh*, 4 Y. and C. Exch. 42; 5 Jur. 21.

A statute may, however, give a tenant a right of action against his fellow tenant for mining ore without his consent. *Murray v. Haverly*, 70 Ill. 318. See *Childs v. Kansas City, etc., Co.*, 117 Mo. 414; 23 S. W. Rep. 373.

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of the parties entirely.”⁷ And in a dictum in an Illinois case it was said: “The mines, when opened, in their nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds. The only partition that can be made is to order a sale of the mines and divide the proceeds.”⁸ These were instances where the mines had been opened. Where the mine has not been opened, the right to partition of land having upon it solid minerals has been recognized;⁹ and it will be decreed unless the mineral is so situated that a probably fair division of it cannot be made by dividing the surface of the land.¹⁰ All things being equal, as between a partition and a sale, a partition will be decreed.¹¹ By agreement not to apply for a partition, the owners may bar their right to it.¹² The interest of the several owners of a mine may be such, however, as to prohibit a partition, in which event a sale is the only relief. Thus in an Illinois case it was said: “If these two separate interests and titles were united in one person . . . the owner would have the right to sever the two estates by deed or devise. Where the owner would have that right there is no inherent difficulty in a court of chancery severing the two estates in a partition proceeding, where it is rendered necessary in the interest of justice, and decreeing the dominant estate to one and the servient estate to another. In recognizing this principle we are applying it to the facts of the particular case before us, where the defendants in error consented to accept the servient estate. We do not at this time determine the question whether a person not conversant with the management of the mine could be compelled to accept as his share a mine thus set off to him against his consent, or whether a mine could be set off to a minor.”¹³ Thus where the owner in fee simple of certain lands granted an interest in them, in the following language: “An

⁷ Aspen Mining, etc., Co. v. Rucker, 28 Fed. Rep. 220.

⁸ Lemfers v. Henke, 73 Ill. 405.

⁹ Hughes v. Devlin, 23 Cal. 501; Rainey v. Frick Coke Co., 73 Fed. Rep. 389.

¹⁰ Wilson v. Bogle, 95 Tenn. 290; 32 S. W. Rep. 386; Conant v. Smith,

1 Aiken 67; Kemble v. Kemble, 44 N. J. Eq. 454; 11 Atl. Rep. 733.

¹¹ Boyston v. Miller, *supra*.

¹² Ames v. Ames, 160 Ill. 599; 43 N. E. Rep. 592; *contra*, Haeussler v. Missouri Iron Co., 110 Mo. 188; 19 S. W. Rep. 75; 16 L. R. A. 220.

¹³ Ames v. Ames, *supra*.

undivided third interest in a certain piece of mining ground," describing it, "together with the water-rights, reservoirs, and tale-race belonging to the same, and it is expressly conditioned that this instrument conveys no other right except a mining right on the premises above to the said party of the second part, his heirs and assigns," it was held that there could be no partition as between the grantor and grantee. "The grant," said the court, "does not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant or in common with the grantor. It conveys only a particular estate or incorporeal hereditament in land of which the grantor held the general estate."¹⁴ Thus water rights belonging to a mining claim cannot be partitioned.¹⁵ "Supposing that there may be a right and estate in a mine," said the Supreme Court of Massachusetts, "distinct from that of the soil in which it lies; there seems to be a peculiar fitness in resorting to equity to adjust and regulate the mutual rights of the parties. It is manifest that partition cannot be made by setting off the surface by metes and bounds, because the quantity and value of the mines and ores, and the capacity and facility of access for working them, bear no proportion to the area of the surface under which they lie. Indeed, in making partition at law, it has been found necessary to make special partition, directing the division of the profits, or the alternate enjoyment of the common property, as circumstances may require."¹⁶

§277. Partition of oil or gas lands.

Discussion at length of partition of mines and mineral lands has been made in order to throw some light upon the right of

¹⁴ *Smith v. Cooley*, 65 Cal. 46; 2 Pac. Rep. 880.

¹⁵ *McGillivray v. Evans*, 27 Cal. 92.

¹⁶ *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Boston Franklin, etc., Co. v. Conditt*, 19 N. J. Eq. 394.

In *Canfield v. Ford*, 28 Barb. 336, a conveyance to one of "all the mines, ores, minerals and metals

laying or being in or upon" a certain described tract of land. "together with the right to raise, work and carry away the same, the right to put all buildings and to use all lands necessary for that purpose, and the right of ingress and egress for that purpose." words of inheritance being added. was held to pass a corporeal hereditament, an

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partition of oil or gas lands. There is no doubt that an action of partition lies to divide undeveloped and supposable oil or gas lands, just as it does in case of lands containing solid minerals; for it cannot be known, owing to the peculiar character of gas or oil as a mineral whether the land to be divided is actual gas or oil lands; and to refuse partition on the theory that it may be, would be for the court to enter upon the domain of mere speculation or supposability. But after gas or oil has been discovered on the land, an entirely different question is presented. If the entire tract has been developed, and the wells are so distributed, and their production is well known so that their respective values can be determined, then a division might possibly be decreed; but it would be almost impossible to find an instance of this kind. And then, too, other powerful wells, in spite of the supposition that the land had been fully developed, might be sunk upon one part of the divided tract and all attempts to find other productive wells on the other tract might be failures. In such an event the partition proceedings would result in an unequal division in value, a thing studiously avoided in partition proceedings. The nearest approach to the question is one relating to a partition of water rights connected with a mining claim, which cannot be done;¹⁷ or of a running stream of water flowing through the joint property, or of streams under ground.¹⁸ Especially can there be no partition of the right to take oil or gas from beneath a tract of land, the surface being owned by a third person; and an attempt of the court to make partition of such a right is void.¹⁹

§278. Accounting between co-tenants.

If one tenant work a mine, he must account to his co-tenant; and if he lease the premises, his co-tenant may exact his share

estate of inheritance, for a part of which an action of partition would lie.

¹⁷ *McGillivray v. Evans*, 27 Cal. 92.

¹⁸ *Willis v. Perry*, 92 Ia. 297; 60 N. W. Rep. 727; 26 L. R. A. 124.

¹⁹ *Hall v. Vernon*, 47 W. Va. 295; 34 S. E. Rep. 764; 49 L. R. A. 464; *Christy's Appeal*, 110 Pa. St. 538; 5 Atl. Rep. 205 (coal); 9 Morr. Min. Rep. 42.

of the rent or royalty,²⁰ or he may resort to the lessee and require him to pay the value of his share of ore taken out the same as he could do if his fellow-tenant had taken out the ore instead of leasing the right to do so.²¹ If the one tenant work the mine he must account to his co-tenant for his just share of the proceeds. In case of a gold mine where one tenant took more than his share of the proceeds it was said he must account to his co-tenant for the surplus and for all the profits made out of such surplus; and if there be no proof that he used such surplus, and no proof as to whether he made any profits out of it, the law will raise a presumption that he did make a profit out of it, and that the profits were equal to the legal rate of interest on the value of such surplus.²² If there be no dispute as to the amount mined, and the only question is the proportion of that amount the co-tenant is entitled to receive, *assumpsit* lies to determine that question.²³ Where the co-tenants were lessees of the mine from different owners of undivided portions of certain ore beds, it was held not to be a good defense on that part of the defendant tenant that he had accounted to his landlord for all he had taken out; for if he account for more than his proportion, he did so at his peril.²⁴ In a case where the fellow tenant had worked a coal mine, it was held that his co-tenant was entitled to recover the value at the pit's mouth of his share of the coal raised, less all costs of getting and raising it.²⁵ This might be termed the net profits; and this amount is reasonable.²⁶ This rule is applicable to the

²⁰ Job v. Potton, L. R. 20 Eq. 84; 44 L. J. Ch. 262; 23 W. R. 588; 32 L. T. 110; Denys v. Shuckburgh, 4 Y. and C. Exch. 42; 5 Jur. 21; Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. St. 421; 33 Atl. Rep. 687.

²¹ Mercur v. State Lime, etc., Co., 171 Pa. St. 12; 22 Atl. Rep. 1126.

²² Huff v. McDonald, 22 Ga. 131; Coleman's Appeal, 62 Pa. St. 252; Grubb v. Grubb, 101 Pa. St. 11; Fulmer's Appeal, 128 Pa. St. 24; 18 Atl. Rep. 493; Goller v. Fett, 30 Cal. 481; McCord v. Mining Co., 64

Cal. 134; Barnum v. Landon, 25 Conn. 137; Harrington v. Florence Oil Co., 178 Pa. St. 444; 35 Atl. Rep. 855.

²³ Winton Coal Co. v. Pancoast Coal Co., 170 Pa. St. 437; 33 Atl. Rep. 110.

²⁴ Barnum v. Landon, 25 Conn. 137.

²⁵ Job v. Potton, *supra*.

²⁶ Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. St. 421; 33 Atl. Rep. 687; Williamson v. Jones, 39 W. Va. 231; 19 S. E. Rep. 436; 38 L. R. A. 694.

production of gas and oil. In a Pennsylvania case, in speaking with reference to a coal mine operated by one of the co-tenants, the Supreme Court said:

“It is urged, however, that before any liability to account can arise, it must appear that the co-tenant upon whom the demand for an account is made has actually taken out more than his just share or proportion of the entire mass of ore in the beds or banks. It might be enough to say that the Act of Assembly makes no such provision. It applies to any case where coal, iron ore, or other mineral has been or shall be taken from the common property. It does not say or imply more than a just share or proportion. The remedy would be illusory if such a construction should prevail. No one can tell what the just share or proportion of each tenant will be until the whole mine or bank is exhausted of its entire deposit. In such a mass — practically inexhaustible for generations to come — it would make the one ninety-sixth part equal to the other ninety-five, and really destroy to that extent their proportionate value. Here a tenant in common exercises his undoubted right to take common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore in place is therefore the only just basis of account. This is the same as the value of what is called ore leave — that is, what the right to dig and take the ore is worth. Indeed all parties, as well as the master and court below, seem eventually to have settled upon this basis. But how is the value of ore leave to be ascertained? It is evident in the nature of things that it can have no general market price. It will depend necessarily upon the position and circumstances of each particular mine, as well as on the character of the ore. The value of it at the pit's mouth depends upon its quality and its proximity to the furnace where it is to be used, and on the means of transportation. In addition to this, the price of ore leave will be influenced by the expense and risk of process of mining or taking it from its place to the pit's mouth. It is evident that the price given for ore leave in other mines or beds can afford no safe criterion, unless they should be precisely similar in all respects to the

one in question. As to the Cornwall ore banks, no sale had ever been made of ore leave. No evidence was laid before the master as to what, in the opinion of the experts, ore leave in these banks would have commanded in the market. The master arrived at it by ascertaining the market value of the ore at the pit's mouth, and then deducting from that the cost of mining. We cannot see, under all the circumstances, that any more just and equitable mode could have been adopted. We do not mean to say that it would hold in any other case than the one now before the court — certainly not where the mining is expensive and hazardous. Where the tenant in common of a coal mine, for example, must with great outlay of capital construct expensive machinery, and incur all the risks of such an undertaking, the value of ore leave or coal in place could not be ascertained by so simple a calculation. The usual profits embarked in such a hazardous enterprise, with the proper allowance for personal skill and attendance, would seem to be more than fair and reasonable deductions. Certainly any business man, sitting down to calculate what he ought to give for ore leave, would take all these elements into consideration. Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position and place it on the surface, enhanced in value for the benefit of a stranger. We leave the rule in such a case to be determined when it arises.”²⁷

Where a fellow tenant has made an express promise of a certain sum as his co-tenant's share of operating gas or oil territory, assumpsit by the latter will lie against the former; but if no such promise has been made, then the only remedy is by account for a share of the profits. Under no circumstances in such a case is the co-tenant entitled to a share of the product taken out of the ground. Thus where all but one of several co-tenants of an oil lease assigned the entire lease for a share of the oil produced, to be delivered to a pipe line company to the credit

²⁷ Coleman's Appeal, 62 Pa. St. 28; 100 Am. Dec. 658; McCord v. 252; Williamson v. Jones, 43 W. Oakland Quick Silver Mining Co., Va. 562; 27 S. E. Rep. 411; Early 64 Cal. 134; Trees v. Eclipse Oil v. Friend, 16 Gratt. 21; 78 Am. Dec. Co., 47 W. Va. 107; 34 S. E. Rep. 649; Graham v. Pierce, 19 Gratt. 933.

of those assigning; and one of the joint owners of the lease, who did not join in the assignment, notified the pipe line company not to deliver or pay for any of the oil so received by it to the assignors, it was held that the assignors were entitled to all the oil delivered to the pipe line company, and that the remaining joint owner could claim no part of it.²⁸ Three persons were joint owners of a lease. Two of them agreed that one of the two should work the oil well on it in place of a former employee employed by the owner of the third part. The owner of the third part did not assent to the arrangement, but received his share of the product. It was held that the latter was not liable to the part owner working the oil well for his share of the expense; but it was said that he might be liable to his co-tenants for the necessary expense and care of the oil produced, but not to the part owner working the well, because he had not employed him.²⁹ Nor can a joint tenant recover from his co-tenants the expense of pumping an oil well pumped against their consent, even though a statute gives a right of action by *assumpsit* against "any joint owner, joint tenant or tenant in common, holding an interest in and operating" an oil well for his share, unless a contract, either express or implied, be shown as the basis of the claim.³⁰ Where the lease is worked under an agreement, each owner must bear the loss of working it in proportion to their interests.³¹ In a case where a co-tenant had expended a large sum of money in working an oil lease, the court said: "I should think that a co-owner who has expended so large a sum, entirely at his own risk, but with the knowledge of the other co-owners, in so hazardous enterprise as developing oil in an unexplored field, ought not to do more than account for their proportion of a customary royalty, proper and fair under the circumstances."³²

²⁸ Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. St. 421; 33 Atl. Rep. 687; Johnston v. Price, 172 Pa. St. 427; 33 Atl. Rep. 688; 37 W. N. C. 387; 26 Pitts. L. J. (N. S.) 357 Murtland v. Callihan, 2 Super. Ct. (Pa.) 340.

²⁹ Thompson v. Newton (Pa.); 7 Atl. Rep. 64.

³⁰ Murtland v. Callihan, 2 Super. Ct. (Pa.) 340; Johnston v. Price, *supra*.

³¹ Harrington v. Florence Oil Co., 178 Pa. St. 444; 35 Atl. Rep. 855.

³² Williamson v. Jones, *supra*.

§279. Accounting when tenant excludes co-tenant.

Where one tenant excludes his co-tenant under a claim of ownership of the entire tract, and then works the tract for the oil or gas that is in it, he must account to his co-tenant for his share of the product taken out, and will not be allowed to deduct therefrom any part of the expenses necessarily incurred in operating the wells on the tract.³³ In this case the defendant purchased of his co-tenant, by fraudulent representations, his interest in an oil lease; and upon demand for a reconveyance, the former offered to do so if the latter would pay his share of all the operating expenses incurred after the conveyance was made. This offer was refused; and in an action to recover his full share of the entire product it was held that no cost of securing it should be deducted. "Is the wrong-doer," asked the court, "entitled in such a suit to recoup from the value of a mineral as a chattel, the expense of mining or producing it? The mere statement of the proposition in this form suggests the only answer that can be given, unless it is the policy of the law to make the way of the transgressor easy and secure. The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it would probably have been used if they had all remained in possession, does not mitigate the tort nor qualify the ordinary rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title." This rule was applied where a life tenant, who was also a co-tenant in common, bored wells on the land, claiming it as his own. It was considered that he was a trespasser, and should not be allowed anything for the cost of production.³⁴

³³ *Foster v. Weaver*, 118 Pa. St. 694. See also *Omaha, etc., Co. v. Tabor* 13 Colo. 41; 21 Pac. Rep.

³⁴ *Williamson v. Jones*, 43 W. Va. 925; 5 L. R. A. 236.
562; 27 S. E. Rep. 411; 38 L. R. A.

§280. Owner of surface not co-tenant with owner of mineral beneath surface.

If one person own the surface and another the minerals beneath it, there is no co-tenancy existing between them. Therefore, there is not that relation between them that forbids one of them purchasing an outstanding title relating to the other's interest, and holding it adversely to him.³⁵ Thus where the owner of land conveyed it to his grantee, but reserved all the minerals beneath the surface, it was held that he could purchase the title of his grantee at a tax sale, and in that way acquire the title to the entire land.³⁶

§281. Purchase by tenant of co-tenant's interest.

In the purchase of his co-tenant's interest, a tenant is not bound to reveal to him the value of the interest he is purchasing, nor the fact that valuable minerals, or oil or gas exist upon the land they jointly own. There is no such relationship between them as requires him to disclose such facts. They deal with each other at arm's length.³⁷

§282. Equity jurisdiction of an accounting.

Under a contract specifying their individual interest in a lease held and the business of operating it by tenants as co-partners in pumping and selling the oil produced from a well thereon, a bill for an accounting is the exclusive remedy for the settlement of their accounts.³⁸ So equity has jurisdiction of suit for an accounting by the owners of an interest in an oil lease against the owner of the remaining part, although each party ran their own share of oil to their own credit and sold it,

³⁵ Virginia Coal Co. v. Kelley, 93 Va. 332; 24 S. E. Rep. 1020.

³⁶ Hutchinson v. Kline, 199 Pa. St. 564; 49 Atl. Rep. 312.

³⁷ Neill v. Shamburg, 158 Pa. St. 263; 27 Atl. Rep. 992. In this case it was further held that the fact that the purchaser had a mortgage

from the vendor on his interest did not alter their relations, so as to require a disclosure of the value of the interest purchased.

³⁸ Johnston v. Price, 172 Pa. St. 427; 37 W. N. C. 387; 26 Pittsb. L. J. (N. S.) 357; 33 Atl. Rep. 688.

where the latter kept account of all expense of operating the leasehold, under a statute giving courts jurisdiction in all cases where an action of "account rendered" would lie.³⁹ So equity has jurisdiction of a bill of discovery to ascertain the rights and relations of all the parties to an oil lease, and sublease thereunder, and for an accounting for the profits from the sale of gas.⁴⁰

§283. **Expense of working joint property.**

One tenant is not compelled to contribute to the working of gas or oil land⁴¹ unless he agree to do so; although a refusal to do so will not deprive him of a right to demand an accounting, as we have seen, elsewhere, for the oil or gas taken out.⁴² To permit one tenant, against the desires of his co-tenant, to engage in the operation of oil or gas lands; and charge him with a share of the operating expenses, might bring the latter to bankruptcy, or compel him to dispose of his land at a great sacrifice. And where a statute provided that any one performing labor in pumping an oil well might recover from any tenant in common of the premises, not, however, requiring the latter to pay any share of the expenses of operation commenced and carried on without his authority and consent, it was held that a tenant in common was not liable to pay for labor performed in pumping an oil well, where he offered to furnish a capable, and competent person to do the work; and his co-tenant refused to accept the services of such person or permit him to do the work.⁴³

³⁹ *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; 35 Atl. Rep. 855.

⁴⁰ *Akin v. Marshall Oil Co.*, 188 Pa. St. 614; 41 Atl. Rep. 748.

⁴¹ *Taylor v. Fried*, 161 Pa. St. 53; 28 Atl. Rep. 993; *Baker v. Brennan*, 12 Ohio C. D. 211; 22 Ohio C. C. Dec. 241.

⁴² *Thompson v. Newton* (Pa.), 7

Atl. Rep. 64. As has been said, the amount allowed on an accounting, where no other question is involved, is generally the usual royalty. *Williamson v. Jones*, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694

⁴³ *Murtland v. Callahan*, 2 Pa. Sup. Ct. 340.

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§284. When a tenant bound by co-tenant's act.

As a rule a tenant is not bound by his co-tenant's act concerning the joint premises. But there may be instances in which he will be, aside from the question of partnership. Thus if it be necessary that certain work be done for the preservation of the joint premises, and his co-tenant do it or have it done, the other tenant will be liable for his proportionate share of the expenses, which is a lien on his interest.⁴⁴ So if one tenant have a valid lien on the joint estate, the other must contribute a share proportionate to his interest.⁴⁵ So if one of several joint lessees, with intent to surrender the lease as to all, and with the knowledge of his co-tenants, surrender the lease his co-tenants will be bound by his act.⁴⁶ So one of several joint lessors may accept a surrender of their lease so as to relieve the lessee from the payment of the rent.⁴⁷

§285. Injunction.

One co-tenant may maintain an action for an injunction against a trespassing stranger to preserve the joint property; and so he may maintain an action against his co-tenant who has taken possession of the joint property to his exclusion, is denying his title, and is working the joint property, on the ground that such act is one of waste.⁴⁸

§286. Surrender of lease by co-tenant.

One co-tenant in common cannot, without the consent of his fellow tenants, bind their interests by a surrender of their

⁴⁴ Beck v. O'Connor, 21 Mont. 109; 53 Pac. Rep. 94; Haven v. Mehlgarten, 19 Ill. 90; Alexander v. Ellison, 79 Ky. 148.

⁴⁵ Eads v. Retherford, 114 Ind. 273; 16 N. E. Rep. 587. See Prentice v. Janssen, 79 N. Y. 478; Holbrooke v. Harrington (Cal.), 36 Pac. Rep. 365.

⁴⁶ Hooks v. Forst, 165 Pa. St. 238; 30 Atl. Rep. 846.

⁴⁷ Churchill v. Lammers, 60 Mo. App. 244.

⁴⁸ Williamson v. Jones, 43 W. Va. 562; 27 S. E. Rep. 411; 38 L. R. A. 694. See Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. Rep. 933.

lease,⁴⁹ unless he is given express (or perhaps implied) authority so to do.⁵⁰

§287. Payment of rent or royalties.

Where joint owners of land give an oil lease upon it, the lessee may pay the royalties or rent to both or either one of them; and if one of them convey his interest in the land or assign his interest in the lease, then payment may be made to the remaining lessor or to the assignee, and either can receipt for it.⁵¹

§288. Fidelity relation between members of a mining partnership.

There is not that relationship existing between tenants in common or partners of a mining partnership which forbids one tenant or one partner demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-workers, as exists between members of an ordinary partnership and prevents such a transaction.⁵² Thus where it appeared that tenants in common of a mine had formed a mining partnership to develop the mine, showing profits and losses in proportion to their respective losses; but there was no such partnership formed for the purpose of selling the property; and the partners had settled up, and there was no further agreement to develop the mine; it was held that one partner who had sold his interest for more than his co-partners had received could not be made to account to them for the surplus, for, as to the mine, they were only tenants in common.⁵³ A partnership agreement to locate a mining claim is within the Statute of Frauds and must be in writing to bind the partners; and if it is not in writing, the remaining partners are without a remedy if one of their number takes title to a claim in his own name,

⁴⁹ *Edmonds v. Mounsey*, 15 Ind. App. 399; 44 N. E. Rep. 196; *Williams v. Vanderbilt*, 145 Ill. 238; 34 N. E. Rep. 476; *Hooks v. Forst*, 165 Pa. St. 247; 30 Atl. Rep. 846.

⁵⁰ *Hooks v. Forst*, *supra*.

⁵¹ *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202; 41 W. N. C. 491; 38 Atl. Rep. 1021.

⁵² *Harris v. Lloyd*, 11 Mont. 390; 28 Pac. Rep. 736.

⁵³ *Harris v. Lloyd*, *supra*.

to their exclusion, unless partnership funds have been expended in its acquisition, in which event equitable relief will be given, on the ground of a resulting trust.⁵⁴ Where four purchased mining land from the State, only two giving bonds, with sureties, for the purchase money; and all but one left the State, abandoned the work, gave the remaining one no aid, allowing him to be pressed for money; and he surrendered the land to the State, and afterwards repurchased it in his own name, and sold it at a profit, it was held that he was not bound to account to his partners for the profit.⁵⁵ It was considered that the three partners had abandoned the enterprise.⁵⁶ Where certain parties purchased land for themselves, and represented to a company to be formed that they had purchased such lands for the proposed company, they having been obtained at first cost from the vendors; it was held to be a fraud upon those interested in the company to allow such purchasers to put them into the company at a price in advance of the actual cost price, without first informing such associates of the actual advance. They were required to account for the profits they had made in the transaction.⁵⁷ In a case of this character this language was used:

“There are two principles applicable to all partnerships or associations for a common purpose of trade or business which appear to be well settled on reason and authority. The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have ordinarily cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were, in no sense, agents or trustees in the original purchase, and it follows, that there

⁵⁴ *Craw v. Wilson*, 22 Nev. 385; 40 Pac. Rep. 1076.

⁵⁵ *Rhea v. Tathem*, 1 Jones Eq. 290.

⁵⁶ *Rhea v. Vannoy*, 1 Jones Eq. 282.

⁵⁷ *Simons v. Vulcan Oil, etc. Co.*, 61 Pa. St. 202. See *McElhenny's Appeal*, 61 Pa. St. 188.

is no confidential relation between parties, which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in *Foss v. Harbottle*,⁵⁸ 'A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a given purpose.' This principle was recognized and applied by this court in the recent case of *McElhenny v. Hubert Oil Co.*⁵⁹ 'It nowhere appears,' said the present Chief Justice, 'that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arm's length, as it seems he did.' And, again: 'If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale.' In that case, McElhenny, being the owner of property which had cost him only \$4,000, sold it to Baird, Boyd & Co. and others, who associated with him to form an oil company, for \$12,000, and it was decided that the company could not call him in equity to account for the profit he had made. The second principle is, that where persons form such an association, or begin to start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any one of them to purchase property, for the purpose of such a company, and then sell it at an advance, without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership — one partner cannot buy and sell to the partnership at a profit; nor if a partnership is

⁵⁸ 2 Hare 480.

⁵⁹ 61 Pa. St. 188.

in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business, each associate is the general agent of the others, and he cannot divest himself of that character without their knowledge and consent. This is the principle of *Hichens v. Congrove*,⁶⁰ *Fawcett v. Whitehouse*,^{*60} and the other cases which have been relied on by the appellants. It was recognized in *McElhenny v. Hubert Oil Co.*, just cited, and also in *Simons v. The Vulcan Oil Co.*⁶¹ Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case, delivered by Thompson, C. J., it is said: 'If the defendants, in fact, acted as the agents of the company in acquiring the property, they could not charge a profit against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same price they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company, in ignorance of the true sums actually advanced.' The defendants in that case were subscribers, with others, to the stock of a projected oil company, and, after the plan had been formed, secured to themselves by contract the refusal of the property, which they afterwards sold to the company at a greatly advanced price."⁶²

⁶⁰ 4 Russ. 562.

^{*60} 1 Russ. and M. 132.

⁶¹ 61 Pa. St. 202.

⁶² *Densmore Oil Co. v. Densmore*,

64 Pa. St. 43.

CHAPTER XII.

CONTRACTS FOR A LEASE.

- §289. Not often drawn into controversies.
- §290. Indefiniteness.
- §291. What is a sufficient writing.
- §292. Effect of taking possession under contract.
- §293. Specific performance of contract for lease.
- §294. Damages for breach of contract to give lease.

§289. Not often drawn into controversies.

Contracts for leases of gas or oil lands are not often brought before the courts; but such contracts with reference to mining leases are not uncommon, and from these analogous cases we will draw a few illustrations.

§290. Indefiniteness.

If a contract for a lease be indefinite or uncertain in its terms, it cannot be enforced.¹ It must be an actual indefiniteness, and not an apparent one which can be removed by parol evidence.² Where the description is so indefinite as to not describe the premises, the contract cannot be enforced, even though the lessee be put into a possession of a part of them, in connection with another person asserting similar rights to a part of it; and if the lessee has not complied with all the agreements on his part, he is without a remedy.³ Mined products are continuously fluctuating in value, and for that reason time is of

¹ *Lancaster v. DeTrafford*, 31 L. Cope, 25 Beav. 140; 27 L. J. Ch. J. Ch. 554; 7 L. T. 40; 10 W. R. 468; 4 Jur. (N. S.) 227; 31 L. T. 474; 8 Jur. (N. S.) 873. (O. S.) 48; 6 W. R. 304.

² *Shardlow v. Cotterell*, 20 Ch. ³ *Lancaster v. DeTrafford*, 31 L. Div. 90; 51 L. J. Ch. 353; 45 L. T. J. Ch. 554; 7 L. T. 40; 10 W. R. 572; 30 W. R. 143; *Haywood v.* 474; 8 Jur. (N. S.) 873.

the essence of all contracts for a mining lease; and the contract in this respect must be definite.⁴

§291. What is a sufficient writing.

As an oil lease is an interest in lands, a contract to give one must be in writing in order to bind the owner of the land, the Statute of Frauds requiring this. The writing, to be a binding contract, must be signed by the owner of the land, but need not be by the person to receive the lease, though that is the usual practice.⁵ A formal agreement is not necessary, it is sufficient if there be a note or memorandum of the agreement containing the names of the parties, the consideration, and the subject matter.⁶ The contract may be embraced in two or more papers; and the language used in the several papers may be such as connect them without further evidence;⁷ but if the language used does not so connect them, parol or other evidence is admissible for that purpose.⁸ The contract may be signed by the agent of the property owner, without having been authorized in writing so to do; and if the person signing had no authority so to do, yet his act may be ratified and thus become binding.⁹ An agreement for a lease must be an actual agreement, and merely drawing up a written paper and signing it, when in fact there is no agreement will not make an agreement

⁴ *Pendergast v. Turton*, 13 L. J. Ch. 268; 5 Jur. 1102; 8 Jur. 205; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865.

Huxhan v. Llewellyn, 21 W. R. 570; ⁷ *Boydell v. Dummond*, 11 East. 142.

Walker v. Jeffreys, 1 Ha. 341; 11 L. J. Ch. 209; 6 Jur. 336; *London v. Mitford*, 14 Ves. 58; *Aloway v. Braine*, 26 Beav. 575; 33 L. T. 100.

⁵ *Laythorp v. Bryant*, 2 Bing. N. C. 735; 5 L. J. C. P. 217; 3 Scott 238; 2 Hodges 25; *Seton v. Slade*, 7 Ves. 274.

⁶ *Williams v. Lake*, 2 El. and El. 349; 29 L. J. Q. B. 1; 6 Jur. (N. S.) 45; 1 L. T. 56; 8 W. R. 41;

Sale v. Lambert L. R. 18 Eq. 1; 43 L. J. Ch. 470; 22 W. R. 478; *Ros-siter v. Miller*, 3 App. Cas. 1124; ⁸ *Nene Valley v. Dunkley*, 4 Ch. Div. 1; *Long v. Millar*, 4 C. P. Div. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720; *Pearce v. Gardner* [1897], 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518; *Cochrane v. Justice Mining Co.* (Colo.), 26 Pac. Rep. 780.

⁹ *Dickinson v. Doodds*, L. R. 2 Ch. Div. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 W. R. 594; *Bel v. Balls* [1897], 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 379.

that can be enforced.¹⁰ Part performance will dispense with a reduction of the agreement to writing; and such a part performance is where possession has been given and taken under the oral contract,¹¹ not where it has been taken without an agreement — or where possession has been continued by agreement, followed, in either instance by expenditures made upon the faith of the contract.¹² But a mere understanding is not sufficient, nor is what may be termed an “inchoate” agreement, as where the contract is not complete, one or more of the essential parts yet to be supplied. Such would be the case where the price, in an instance of a sale or lease, was not definitely fixed, even though all the other essentials were contained in the writing. But even in an instance of this kind, such an understanding may be rendered valid when works of an expensive character have been built upon the premises by the prospective grantee or lessee with the full knowledge of the grantor or lessor, upon the faith of the understanding being carried out by both parties,¹³ or if the inchoate agreement being completed,¹⁴ and the works so constructed would be useless by the determination of the understanding or inchoate agreement; but if there would be no such loss, then the understanding or inchoate agreement would not be carried out.¹⁵ It is not uncommon for parties to make a note or memorandum of a contract from which a formal

¹⁰ *May v. Thompson*, 20 Ch. Div. 705; 51 L. J. Ch. 917; 47 L. T. 295; *Bellany v. Debenham* [1891], 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 468; 39 W. R. 257. Of course a contract otherwise illegal cannot be enforced; and the mere fact that it is put in writing will not render it enforceable. *South African Territories v. Wallington* [1898], A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545.

¹¹ *Surcombe v. Pinniger*, 3 De G. M. and G. 571; 22 L. J. Ch. 419.

¹² *Hodson v. Heuland* [1896], 2 Ch. 428; 65 L. J. Ch. 754; 74 L. T. 881; 44 W. R. 684; *Neale v. Neale* 9 Wall 1; *Seavey v. Drake*, 62 N. H.

393; *Dawson v. McFaddin*, 22 Neb. 131; 34 N. W. Rep. 338; *Truman v. Truman*, 79 Ia. 506; 44 N. W. Rep. 721; *Moore v. Small*, 10 Pa. St. 461; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Manly v. Howlett*, 55 Cal. 94; *Langston v. Bates*, 84 Ill. 524; 25 Am. Rep. 466; *Murphy v. Stell*, 43 Tex. 123; *Lester v. Lester*, 28 Gratt. 737.

¹³ *Jackson v. Cator*, 5 Ves. 687.

¹⁴ *Powell v. Thomas*, 6 Ha. 306.

¹⁵ *Bankart v. Tennant*, L. R. 10 Eq. 141; 39 L. J. Ch. 809; 23 L. T. 137; 18 W. R. 639.

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contract is to be drawn up. This occurs also often in instances of negotiations by correspondence. Usually, if not always, these notes or memoranda contemplate the drawing up of a formal contract before there is a binding obligation between the parties. When such is the case, the failure to execute such a formal contract may or not terminate the relation of the parties or the enforceability of the negotiations or agreement. If the note, instrument or writings contain their final agreement it may be enforced, notwithstanding the fact that no formal agreement has ever been drawn up, for such note, instrument or writings contain their contract.¹⁶ If it does not contain the final agreement, it cannot be enforced.¹⁷ Of course, in all such instances the question is one of construction of the written note or memorandum.¹⁸ Where the contract arises out of an offer and acceptance, the acceptance must be as broad as the offer and not exceed it; for if the acceptance contain any qualification of the offer it will be regarded as a counter offer which will require the acceptance of the party making the first offer; in which instance the offer, counter offer and acceptance will constitute the contract for the lease.¹⁹ Thus in answer to an advertisement for bids for a lease of a mine, a mining company received a letter in which the writer offered "to take lease on the whole property at thirty-five per cent royalty at eighteen months, and agree to expend at least five thousand dollars every month in development work; I to have thirty days to begin work, in order to make examination of property, and put machinery in place. Lease to date from time of commencement of work. Settlement as usual." The officers of the mining company voted to accept the offer, and empowered its president to draw up a lease in conjunction with the person making the offer, and present it to the board of directors for their consideration. The

¹⁶ *Rossiter v. Miller*, 3 App. Cas. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865; *North v. Percival* [1898], 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552.

¹⁷ *Lloyd v. Newell* [1895], 2 Ch. 744; 64 L. J. Ch. 744; 73 L. T. 154; 44 W. R. 43.

¹⁸ *Rossiter v. Miller*, *supra*.

¹⁹ *Pattle v. Hornibrook* [1897], 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123; *Routledge v. Grant*, 4 Bing. 660; *South Heton Coal Co. v. Haswell Coal Co.* [1898], 1 Ch. 465; 67 L. J. Ch. 238; 78 L. T. 366; 46 W. R. 355.

president at once telegraphed the bidder that the lease had been awarded to him; and this was held to constitute a binding contract for a lease, and the company could not insist that he accepted a lease which required him to do certain work regardless of its productiveness, and give it, the company, privileges, under certain contingencies, to dispose of the ore mined.²⁰

§292. **Effect of taking possession under contract.**

Usually one put into possession, under a contract for the purchase of real estate, before the actual completion of the purchase, waives the right to object to the vendor's title and for that reason refuse to complete the purchase. Care, however, must be observed in this connection. Thus there is a broad difference between a possession taken under a contract which provides that the title shall be a good one, and also provides that possession may be taken before the purchase is completed; and one under which possession is taken makes no provision for such a title. And where it is claimed that there was a waiver of a right to insist that a good title be shown before the purchase shall be completed, the distinction between instances where the vendor can remove the objections to the title, and those, to the knowledge of the vendee that they are not removable, must be borne in mind. And the reason for this is that where a vendee knows of defects in the title or conditions affecting it, and that the vendor has no control over them, by taking or remaining in possession of it, he waives his right to insist on the particular irremovable objections of which he had knowledge before he took possession.²¹ These rules, however, are not applicable in their full force to sales or leases of mines; for as their time is often of the essence of a contract, one who has agreed to accept the lease of a mine may take possession of it before the lease is granted, and his entrance will

²⁰ *Cochrane v. Justice Mining Co.* (Colo.), 26 Pac. Rep. 780.

Bown v. Stenson, 24 Beav. 631;

Burnell v. Brown, 1 J. and W. 168;

²¹ *In re Gloag and Miller's Contract*. 23 Ch. Div. 320; 52 L. J. Ch. 654; 48 L. T. 629; 31 W. R. 601;

Stevens v. Guffy, 3 Russ. 171; 6 L. J. (O. S.) 164.

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not be considered as an acceptance of the title of the lessor to grant the lease.²²

§293. Specific performance of contract for lease.

Where a valid contract for a lease has been executed, a court of equity will decree a specific performance, and compel the execution of a lease in accordance with the terms of the contract, but the court will not decree a working of the premises to which the contract relates, leaving the parties to their action for damages.²³ And where damages will afford adequate relief, or there is an uncertainty in the contract, specific performance will not be decreed.²⁴ If the contract for a lease is not complete, then specific performance will not be decreed nor damages awarded; and an absence of any essential part in the contract will be fatal to the person claiming under it.²⁵ But mere uncertainty as the identity of the land referred to, which may be removed by parol evidence, will not, however, defeat the action either for damages or for specific performance.²⁶ Only such a lease will be decreed as the contract calls for, without any variation from it.²⁷ If, pending the suit for a specific performance, the owner lessen the value of the lease-to-be, by extracting the thing for which the lease was granted, the court will award damages in that suit, or if they be not discovered until after the decree, in a supplemental action.²⁸ If there has been inadvertent misrepresentation on the part of the owner of the land, specific performance at his instance will not lie to compel the

²² Haywood v. Cope, 27 L. J. (N. S.) Ch. 468; 25 Beav. 140; 4 Jur. (N. S.) 227; 31 L. T. (O. S.) 48; 6 W. R. 304. See Davis v. Shephard, L. R., 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122.

²³ Wolverhampton R. R. Co. v. London, etc., R. R. Co., L. R. 16 Eq. 433; 43 L. J. Ch. 131; Powell Duffryn Coal Co. v. Taff Vale Rail Co., L. R. 9, Ch. App. 331; 43 L. J. Ch. 575; 30 L. T. 208.

²⁴ Ricketts v. Bell, 1 De G. and

Sm. 335; 10 L. T. 105; 11 Jur. 918; Price v. Griffith, De G. M. and G. 80; 21 L. J. Ch. 78; 15 Jur. 1093; 18 L. T. (O. S.) 190.

²⁵ Maynell v. Surtees, 3 Sm. and G. 101.

²⁶ Doe v. Martin, 4 B. and Ad. 785; Price v. Griffith, *supra*.

²⁷ Carne v. Mitchell, 15 L. J. (N. S.) Ch. 287.

²⁸ Nelson v. Bridges, 2 Beav. 239; 3 Jur. 1098.

acceptance of the lease made pursuant to the terms of the contract,²⁹ and the same is much more so where both wilful misrepresentation and fraud have been used to induce the execution of the contract.³⁰ But mere vague commendation or puffing is not enough to defeat specific performance; ³¹ nor is glowing descriptions of the probable success of an adventure.³² Nor is there any misrepresentation such as will avoid the contract if the person complaining of them relied upon his own examination of the premises, or was not misled by them.³³ Occasionally a specific performance of a contract will not be decreed where the owner of the land has not been apprised of the value of the lease he has contracted to grant, as where he has been "surprised," as it were, into signing the contract. Thus where the plaintiff knew all about the value of the mining privileges, and the defendant did not, having recently purchased the land, and he hurried the defendant into signing the agreement, the court refused to decree a specific performance of the agreement, on the ground that an undue advantage had been taken of the defendant, and also on the suspicion that the royalties were grossly inadequate, as was alleged.³⁴ By delaying his action for specific performance — as, for instance, three years and a half — the person insisting upon a decree for it may lose his right to it.³⁵ Delay on the part of the owner in tendering a coal lease, until much of the coal has been taken out of the premises, will defeat his right to a decree for specific performance.³⁶

²⁹ *Higgins v. Samels*, 2 J. and H. 460; 7 L. T. 240; *Ricketts v. Bell*, *supra*.

³⁰ *Powell v. Elliott*, L. R. 10 Ch. App. 424; 33 L. T. 110; 23 W. R. 777.

³¹ *Jennings v. Broughton*, 5 De G. M. and G. 126; *Higgins v. Samels*, *supra*.

³² *Jennings v. Broughton*, 17 Beav. 234; 22 L. J. Ch. 585; 17 Jur. 305; 1 W. R. 441.

³³ *Jennings v. Broughton*, 5 De G. M. and G. 126; *Small v. Attwood*,

6 Cl. and F. 232; 2 L. J. Exch. 1; 1 Younge 407; *Colby v. Gadsden*, 34 Beav. 416; 11 Jur. (N. S.) 760; 12 L. T. 197.

³⁴ *Walters v. Morgan*, 3 De G. F. and J. 718; 4 L. T. 758.

³⁵ *Eads v. Williams*, 24 L. J. (N. S.) Ch. 531; 4 De G. M. and G. 674; 11 Jur. (N. S.) 193; 3 W. R. 98; 24 L. T. 162; *Macbride v. Weekes*, 22 Beav. 533; 2 Jur. (N. S.) 918; 28 L. T. (O. S.) 135; *Gee v. Pearse*, 2 De G. and Sm. 325.

³⁶ *Kille v. Reading Iron Works*,

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§294. Damages for breach of contract to give lease.

Where a person enters into a contract to give a lease, and he has neither title to the land to be leased nor power to execute a lease, the person contracting with him has a right to and may recover substantial damages from him for the breach of the contract.³⁷ Such is not the case, however, where the title is merely defective, or where the lessor has some title; for there only nominal damages are recoverable. If the lease be granted and possession be taken or attempted to be taken under it, but the lack of title or defect in it be not discovered until after the lease be executed and such possession be taken or attempted, the lessee may recover substantial damages under the covenant for quiet enjoyment; and the same is true if there be an express covenant for title.³⁸

141 Pa. St. 440; 21 Atl. Rep. 666. Where a contract for a mining lease contained a clause permitting a surrender by the proposed lessee at any time on giving notice, it was held that a statute authorizing specific performance of an agreement for a lease did not authorize specific performance of such an agreement entered into without a valuable consideration, the lessee having nothing that would entail a loss on his part in case of its non-enforcement. *Grummett v. Gingrass*, 77 Mich. 369; 43 N. W. Rep. 999.

³⁷ *Robinson v. Hurman*, 1 Exch. 850; 18 L. J. Exch. 202; *Hopkins v.*

Grazebrook, 6 B. and C. 31; 9 D. and R. 22; 5 L. J. (O. S.) K. B. 65.

³⁸ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. and C. 416; 8 L. J. (O. S.) K. B. 159. See *Engel v. Fitch*, L. R. 3 Q. B. 314; 9 B. J. S. 85; 37 L. J. Q. B. 145; 18 L. T. 318; 16 W. R. 785. Where the vendor of an interest in a lease retained the possession of it without being obliged to make a resale of it at a lower price, and he made no tender of a conveyance of it, it was held that he could recover only nominal damages. *Carner v. Peters*, 9 Pa. Super. Ct. Rep. 29; 43 W. N. C. 261.

CHAPTER XIII.

ADVERSE POSSESSION—STATUTE OF LIMITATIONS.

- §295. Peculiarities of oil and gas.— Possession of surface.
- §296. Rule as to oil and gas.
- §297. Possession of surface not adverse to owner of oil or gas.
- §298. Possession of oil operator not adverse to owner of surface.
- §299. Acquiring right to oil or gas under Statute of Limitations.
- §300. Receiver.— Title in dispute.— Injunction.
- §301. Accounting.

§295. Peculiarities of oil and gas.— Possession of surface.

In discussing the question of adverse possession and the Statute of Limitations in regard to natural gas and oil, care must be taken to bear in mind the peculiar character of this fluid and this gas, and the ownership in them. The owner cannot claim them as his absolute property until he has reduced them to actual possession. While upon his territory he has a qualified property in them; but as soon as they pass from beneath the surface of his land, even that limited ownership is gone.¹ If the land has been leased for oil or gas purposes, it cannot be said merely because the lessor occupies the surface he has adverse possession of the oil and gas. The same rule applies to coal or any other mineral.²

¹Westmoreland, etc., Co. v. De Witt, 130 Pa. St. 235; 18 Atl. Rep. 724; 5 L. R. A. 731; 29 Amer. L. Reg. 93.

²Catlin Coal Co. v. Lloyd, 176 Ill. 275; 52 N. E. Rep. 144; Catlin Coal Co. v. Lloyd, 180 Ill. 398; 54 N. E. Rep. 214; Caldwell v. Cope-land, 37 Pa. St. 375; 72 Am. Dec. 760; Armstrong v. Caldwell, 53 Pa. St. 284; Plummer v. Hillside Coal & Iron Co., 160 Pa. St. 483; 28 Atl. Rep. 853; Moreland v. Frick Coke Co., 170 Pa. St. 33; 32 Atl. Rep. 634; Lulay v. Barnes, 172 Pa. St. 331; 34 Atl. Rep. 52; 37 W. N. C. 409; McBee v. Loftis, 1 Strobl. Eq. 90.

§296. Rule as to oil and gas.

What is true of coal or other mineral, is also true of oil and gas. It is not sufficient to show, where title by adverse possession is claimed by the surface owner as against the claimant or owner of the gas, that such surface owner has had possession for a period equal in length to the period required to establish title to land by adverse possession, where there has been a severance of the ownership of the oil and gas from land.³ In speaking of adverse possession in such an instance, the Supreme Court of Pennsylvania said:

“They had put down a well, which had tapped the gas-bearing strata, and it was the only one on the land. They had it in their control, for they had only to turn a valve, to have it flow into their pipe, ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill owner affects the continuance of his water right when he shuts his sluice gates. On the other hand, Brown had no possession of the gas at all. His possession of the soil for purposes of tillage, etc., gave him no actual possession of the gas; and he had no legal possession for his lease had conveyed that to another. How, then, had he taken, ‘full and absolute possession of the premises and rights,’ as found by the master; apparently, he had asserted to the complainants his claim that the lease was forfeited. In addition, on one occasion when the agent of complainants was at their well for a specific purpose, Brown had ordered him off the land; but there is no evidence that he went until he had finished his business there. Shortly before this the complainants had sent men on the land to begin the erection of a derrick for a second well, and Brown had ordered them off. This, which is the strongest item in the proof, is really no evidence at all of dispossession of complainants. They still remain in possession of their well, which gave them the sole control of the gas, so far as its utilization was concerned, and the sole pos-

³ Murray v. Allard, 100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740.

session of which it was capable, apart from the land, from which it had been legally severed by the lease. The utmost that can be said of such an occurrence is that it was a violent and temporary interference with that portion of complainant's rights which authorized them to put down a second well. This was no more a dispossession of complainants from their occupation of the gas than blocking up one of a farmer's roads to his house would be an ouster from his farm. We are therefore of opinion that the master was wrong in finding as a fact that complainants were out of possession, and should be remitted to an ejectment to establish their title at law." ⁴

§297. Possession of surface not adverse to owner of oil or gas.

Possession of the surface is not an adverse possession of the oil or gas beneath it where such oil or gas is owned by another or rather where such other has a right to reduce it to possession. Such occupation, and even cultivation, is not even evidence of adverse enjoyment of the right to take oil or gas; and the mere non-user for a long period — as forty years — of the right to take it will not extinguish it, although it may work a forfeiture. "As the right was neither acquired nor evidenced by use, so we think it cannot be lost by misuse. And as there was no adverse enjoyment to raise the presumption of a conveyance or release of it, the right of those holding the written title remains unimpaired." ⁵ In speaking of adverse possession of coal beneath the surface of a tract of land, the Supreme Court of Pennsylvania used the following language:

"It is no doubt, the general presumption that a party who has possession of the surface of land has possession of the subsoil also, because, ordinarily the right to the surface is not severed from the right to the strata below the surface. But this presumption does not exist when these rights are severed.

⁴ Westmoreland, etc., Co. vs. De Witt, 130 Pa. St. 235; 18 Atl. Ap. 724; 29 Am. L. Reg. 93.

⁵ Said of coal beneath the surface. Arnold v. Stevens, 24 Pick.

106; Davis v. Clark, 2 Mont. 310; Kingsley v. Hillside Coal & Iron Co., 144 Pa. St. 613; 23 Atl. Rep. 250.

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Each then becomes a distinct possession. In such a case, the possession of the surface, following the right, is as distinct from the possession of the minerals or subsoil strata which have been severed in right, as is the possession of one tract of land from that of another not in contact with it. Hence it is settled that when by a conveyance or reservation a separation has been made of the ownership of the surface from that of the underground minerals, the owner of the former can acquire no title by the Statute of Limitations to the minerals, by his exclusive and continual enjoyment of the surface. Nor does the owner of the minerals lose his right or his possession by any length of non-user. He must be disseised to lose his right; and there can be no disseisee by act that does not actually take the minerals out of his possession. There seems to be no reason why the Statute of Limitations should not be held applicable to all corporeal hereditaments, including those that are only subsurface rights. . . . In *Caldwell v. Copeland*⁶ it was said that adverse possession of the mine by the owners of the surface for the statutory period would avail as title. But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy. What, then, is adverse possession of the coal in a tract of land, in a case where the owner of the land has by deed severed the ownership of the coal from the ownership of the surface? Its nature cannot be changed by the fact that it is more difficult of enjoyment. Like adverse possession of every other corporeal hereditament, it must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile for twenty-one years in order to give title under the Statute of Limitations. There is no reason for adopting a less stringent rule. The owner of the surface can acquire title against the owner of the minerals underneath by no acts or continuous series of acts that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person, digs pits or drives adits into the minerals, and carries on mining operations there continuously for the statutory period ad-

⁶ 37 Pa. St. 427.

versely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals in the tract of land. He may therefore acquire a title to the whole. But inasmuch as there cannot be any residence upon the coal, or cultivation without continual *pedis possessio*, or retention of the hold upon the mine, there can be no ouster of the owner, and consequently no acquisition of a right. If one digs turves or cuts wood upon another's land for his own use, and if he sells some of the turves he dug or the wood he cut to the neighbors, it is not pretended that he can acquire title to the land by such conduct, though repeated at intervals through the whole period of twenty-one years. . . . The court below, therefore, erred in leaving to the jury to find that the plaintiff had acquired title to the coal by having taken out some of it for family and neighborhood uses, at intervals during twenty-one years, without any evidence that the taking had been constant and continuous." ⁷

§298. Possession of oil operator not adverse to owner of surface.

The lessee or the operator of oil wells under a lease does not have adverse possession of so much of the surface as he actually occupies with his machinery, wells, derricks, pipe lines, oil tanks and the like, as against the owner of the surface; and he cannot in that way obtain title, at least so long as there is oil to be pumped.⁸

§299. Acquiring right to oil or gas under Statute of Limitation.

Title may be acquired by adverse possession of solid mineral, but the possession must be of the actual mineral and not of the surface under which it lies where a severance of the mineral from the surface has taken place.⁹ But if one take possession of the surface, where no severance of the mineral has even taken place, adverse possession against the owner of the land will give title to the mineral beneath it; and a conveyance of

⁷ *Armstrong v. Caldwell*, 53 Pa. St. 284.

⁹ *Armstrong v. Caldwell*, 53 Pa. St. 284; *Caldwell v. Copeland*, 37

⁸ *Dietz v. Mission Transfer Co.* (Cal.), 25 Pac. Rep. 423. Pa. St. 427.

the mineral by the rightful owner before the statute has run will not be such a resumption of possession as will stop the running of the statute — it is not an entry upon the land.¹⁰ This must be an open and not a secret entry.¹¹ Suppose, however, that the owner of the surface should exclude the owner of the oil or gas beneath the surface from entering on such surface and drilling for the oil or gas for a period equivalent to the Statute of Limitations, and during that period such owner of the oil or gas had endeavored — either once or more than once — ineffectually to enter on the surface for the purpose of drilling — would not such acts be such an adverse possession as to defeat the right of the owner of the oil or gas? It seems to us it would. The rule applicable to tenants in common is probably the true one in such an instance. The owner of the oil has no power to secure it unless he can enter upon the surface; and if he is denied that right and excluded for the usual period of the Statute of Limitations applicable to adverse possession, it seems that he has lost his right to drill for and take the oil.¹²

§300. Receiver — title in dispute — injunction.

A receiver will be appointed to operate gas or oil wells when the title to the land is in dispute, in order to prevent a waste during litigation, or where the person taking the oil or gas is insolvent.¹³ So if one invade the premises of another and begin taking oil or gas, an injunction will be issued upon proper application, to restrain him.¹⁴ Where the claim of ownership of a person in possession dated back to a time prior to the right of entry, by parties who were out of possession, and the person in possession was solvent, and to issue an injunction would stop operations and the land during such censure of

¹⁰ *Catlin Coal Co. v. Lloyd*, 180 Ill. 398; 54 N. E. Rep. 214; *Catlin Coal Co. v. Lloyd*, 176 Ill. 275; 52 N. E. Rep. 144; *Kingsley v. Hillside Coal Co.*, 144 Pa. St. 613; 23 Atl. Rep. 250.

¹¹ *Finnegon v. Steinner*, 28 Pittsb. L. J. (N. S.) 68; 5 Pa. Super. Ct. Rep. 127; *Kingsley v. Hillside Coal*

Co., 144 Pa. St. 613; 23 Atl. Rep. 250.

¹² See *Erskine v. Forest Oil Co.*, 80 Fed. Rep. 583.

¹³ *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. Rep. 673.

¹⁴ *Indianapolis Natural Gas Co. v. Kibby*, 135 Ind. 357; 35 N. E. Rep. 392.

operations would be drained by operations on other lands, the court refused to issue an injunction, and sent the parties to a court of law to establish their title to the land.¹⁵ Where in a bill to quiet title, it appeared, though the complainant claimed title, that the defendant was in possession, had drilled wells, removed oil from the premises, and was drilling more wells, the court refused to grant relief, sending the parties to a court of law to bring an ordinary action of ejectment.¹⁶

§301. Accounting.

Mere delay by the lessor in bringing a suit against the lessee for an accounting will not bar a recovery, if the action is not barred by the Statute of Limitations;¹⁷ and color has been lent to the claim that even the Statute of Limitations will not bar the right to an accounting.¹⁸

¹⁵ Erskine v. Forest Oil Co., 80 Fed. Rep. 583.

¹⁶ California Oil and Gas Co. v. Miller, 96 Fed. Rep. 12.

¹⁷ Ahrns v. Chartiers Valley Gas Co. 188 Pa. St. 249; 41 Atl. Rep. 739; Akin v. Marshall Oil Co., 188 Pa. St. 602; 41 Atl. Rep. 748.

¹⁸ Williams v. Short, 155 Pa. St. 480; 26 Atl. Rep. 662. A widow of a partner, where a managing part-

ner continues to manage the property after the death of his co-partner is not barred, as a rule, by the Statute of Limitations, from an accounting. Thomas v. Hurst, 73 Fed. Rep. 372. Secretly extracting mineral prevents the Statute of Limitations running until the extracting is discovered. Lewey v. H. C. Frick Co., 166 Pa. St. 536; 31 Atl. Rep. 261; 28 L. R. A. 283.

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CHAPTER XIV.

RESERVATION AND EXCEPTION.

- §302. Distinction between reservation and exception.
- §303. Severance of mineral by reservation or exception.
- §304. Reservation of "all minerals" includes oil and gas.
- §305. Reservation of right to drill for oil restricted.
- §306. Ownership of gas or oil beneath public highways, rivers or sea.
- §307. Reservation or exception subject to lien of judgment.
- §308. Wife's interest in reservation.— Construction.
- §309. Location of oil claim on public lands.

§302. Distinction between reservation and exception.

The distinction between a reservation and an exception should be borne in mind. "A *reservation* is a clause in a deed whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and of a thing *in esse* at the time: but this is of a thing newly created, or reserved out of a thing demised, that was not *in esse* before."¹ "A reservation is something taken from the whole thing covered by the general terms making the grant, and cuts down and lessens the grant from what it would be except for the reservation."² "An *exception* is something reserved by the grantor out of that which he has before granted. It is indispensable to a good exception that the thing excepted should be a part of the thing previously granted, and not of any other thing."³ "An exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but newly

¹ *Craig v. Wells*, 11 N. Y. 315, quoting *Shep. Touch* 80.

² *Miller v. Lapham*, 44 Ct. p. 434;

Parsell v. Stryker, 41 N. Y. 480;
Ryckman v. Gillis, 6 Lans. p. 79.

³ *Case v. Haight*, 3 Wend. 632;
Darling v. Crowell, 6 N. H. 421.

created out of lands and tenements demised; though exception and reservation have often been used promiscuously.”⁴

§303. Severance of mineral by reservation or exception.

A reservation or exception of all the mineral in a tract conveyed is a separation of the estate in the mineral from the estate in the surface. “A reservation of minerals and mining rights is construed as is an actual grant thereof.” “A reservation of mineral and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had first been granted to him with a reservation of the surface.”⁵ Of course, what is true of a reservation is also true of an exception.⁶ In case of either a reservation or an exception, the grantor has a right to enter on the surface, with all the usual necessary appliances, to remove the mineral, without any express authority reserved to that effect.⁷ In case of a reservation of minerals, such mineral descends to the grantor’s heirs.⁸ A reservation as large as the grant itself is void, and the grant is valid.⁹

§304. Reservation of “all minerals” includes oil and gas.

A clause in a deed of conveyance reserving “all minerals” has been held not to include petroleum, and by analogy not to include natural gas.¹⁰ But this decision has been greatly shaken

⁴ State v. Wilson, 42 Me. 9; Cunningham v. Knight, 1 Barb. 399; Gould v. Glass, 19 Barb. 179.

⁵ Marvin v. Brewster, etc., Co., 55 Ohio St. 538; Farnum v. Platt, 8 Pick. 339; Munn v. Stone, 4 Cush. 146; Wardell v. Watson, 93 Mo. 107; 5 S. W. Rep. 605.

⁶ Snoddy v. Bolen, 122 Mo. 479; 24 S. W. Rep. 142; 25 S. W. Rep. 932; Norton v. Snyder, 2 Hun. 82; Sloan v. Furnace Co., 29 Ohio St. 568; Baker v. McDowell, 3 W. and S. 358; Shoenberger v. Lyon, 7 W. and S. 184; Whitaker v. Brown, 46 Pa. St. 197; Alden’s Appeal, 93 Pa.

St. 182; Foster v. Runk, 109 Pa. St. 291; Lillibridge v. Lackawanna Coal Co., 143 Pa. St. 293; 22 Atl. Rep. 1035.

⁷ Wardell v. Watson, *supra*. Williams v. Gibson, 84 Ala. 228; 4 So. Rep. 350; Dietz v. Mission Transfer Co. (Cal.), 25 Pac. Rep. 423.

⁸ Whitaker v. Brown, 46 Pa. St. 197.

⁹ Shoenberger v. Lyon, *supra*; Foster v. Runk, *supra*.

¹⁰ Dunham v. Kirkpatrick, 101 Pa. St. 36; 47 Am. Rep. 696.

in the State where it was rendered, by a subsequent decision holding that petroleum is a mineral substance obtained from the earth by process of mining and lands from which it is obtained may be designated as mineral lands.¹¹ In another case in another State, a reservation in deed of conveyance of "all mines, minerals and metals in and under the land" was held to include petroleum. "The first question to be determined," said the court, "is whether petroleum oil is included within the language of reservation of 'mines, minerals and metals.'¹²

. . . Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined is, does it fall within the term 'mines and mineral'? . . . In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal, ores of all kinds, clay, stone, slate and coprolites. . . . The term is not limited to metallic substances, but includes salt, coal, paint, stone and similar substances. . . . We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals." After reviewing a number of cases from other States, and especially Pennsylvania, the court concludes: "We are bound to hold that petroleum is a mineral and that it falls within the terms of the reservation in the deed. . . . The same is true of natural gas."¹³ In Ohio, however, in a case of a conveyance of

¹¹ Gill v. Weston, 110 Pa. St. 305; 1 Atl. Rep. 921.

¹² Quoting Century Dictionary.

¹³ Murray v. Allard, 100 Tenn. 100; 43 S. W. Rep. 355; 39 L. R. A. 249; 66 Am. St. Rep. 740.

In an early Pennsylvania case it was said "Oil is a mineral, and being a mineral, is part of the realty." Funk v. Haldeman, 53 Pa. St. 229, 249. Practically the same

language was used in a West Virginia case in defining petroleum. Williamson v. Jones, 39 W. Va. 231; 19 S. E. Rep. 436; 25 L. R. A. 222.

Under a railroad grant reserving minerals, it was decided that petroleum was included. Union Oil Co., 25 Land. Dec. 351.

The United States land laws provide that "Any person authorized

"all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals," in and under a certain described tract, giving the grantee in perpetuity the right "of mining and removing such coal, ore, or other minerals" and "right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, side tracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more," it was held that the deed did not pass the title to the petroleum oil and natural gas in such lands. "The words 'other minerals,' or 'other valuable minerals,' taken in their broadest sense, would include petroleum oil; but the question here is, did the parties intend to include such oil in the mining right? Taking all the terms of the conveyance in the light of the surrounding circumstances, and in view of the above rule of construction,¹⁴ and upon the authority of the case of Dunham against Kirkpatrick,¹⁵ we conclude that the title to the oil did not pass under said conveyance, but remained in the owner of the soil, and upon his death passed to

to enter lands under the mining laws of the United States may enter or obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefore, under the provisions of the laws relating to placer and mineral claims." Act approved Feb. 11, 1897, 29 Stat. at Large 526; 2 Supp. R. S. U. S. 549.

The Supreme Court of the United States has held that salt is not a mineral, within the meaning of the mineral statutes, but in so doing it calls attention to the well known practice of the government in reserving salt springs from sale. *Morton v. Nebraska*, 21 Wall. 660. A recent act of Congress classes saline lands as mineral lands and locatable as placer. Act of January 31, 1901, 21 Stat. at Large 145. In Texas the opposite is held. *State v. Parker*, 61 Tex. 265.

¹⁴ Referring to Barringer and Adams on the Law of Mines and Mining, p. 131, where it is said: "In determining what is included in a lease, the familiar rules of construction are applied. The grant is construed most strongly against the grantor. The whole contract must be considered in arriving at the meaning of any of its parts. Terms are to be understood in their plain, ordinary, and popular sense, unless they have acquired a particular technical sense by the known usage of trade. They are to be construed with reference to their commercial and their scientific import. This rule is of especial importance when the question arises whether a specific mineral is included in a general designation."

¹⁵ 101 Pa. St. 36.

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his heirs. There is nothing to show that it was the intention of the parties that oil should be included in the word 'minerals,' and the easements granted, in connection with the mining right, are not applicable to producing oil¹⁶ and show that oil was not intended to be included in the conveyance. If it had been, apt words would have been used to express such intention."¹⁷ Where a contract was to convey the land but reserving all oil and gas in or under the said lands, with free mining privileges of all kinds, it was held that a deed of conveyance containing a clause "excepting and reserving all gas, oil, coal, ores and other mineral deposits in, under or on the said premises," was not a compliance with the contract; for by the contract the agreement was to convey the "coal, ores and other mineral deposits," as distinguished from "gas and oil."¹⁸

§305. Reservation of right to drill for oil restricted.

Under a reservation of a right to drill for oil or gas, the grantor, his heirs or assigns have a right to drill wells to prospect for oil or gas, even though there is no surface indication of either of them; but the lands cannot be used for the development of other lands, nor machinery used on other lands be stored on it, nor oil taken from other lands be stored on or transported over it.¹⁹

§306. Ownership of gas or oil beneath public highways, rivers or sea.

If the public own the fee in a public highway, then it may take all mineral beneath the surface of such highway, as in an

¹⁶ "Nothing is said about derricks, pipe lines, tanks, the use of water for drilling, or the removal of machinery used in drilling or operating oil or gas wells."

¹⁷ *Detlor v. Holland*, 57 Ohio St. 492; 49 N. E. Rep. 690; 40 L. R. A. 266.

A reservation of "all mines and ores of metal that are or may hereafter be found on the said lands, with the right . . . to mine and carry away the mineral thereon," covers only "mines and ores of metal and

minerals in common use, and commonly known as such," does not cover marble, serpentine, or other building material, which, at the time the reservation was made, was not known to exist in the country. *Deer Lake Co. v. Michigan, etc., Co.*, 89 Mich. 180; 50 N. W. Rep. 807.

¹⁸ *Moody v. Alexander*, 145 Pa. St. 571; 23 Atl. Rep. 161.

¹⁹ *Dietz v. Mission Transfer Co.* 95 Cal. 92; 30 Pac. Rep. 380; *Dietz v. Mission Transfer Co. (Cal.)*, 25 Pac. Rep. 423.

instance of coal,²⁰ or of petroleum.²¹ If the public highway or street be abandoned, the fee, being a base fee, reverts to the person who dedicated it, in case of a dedication,²² or if taken by right of eminent domain, to the abutting property owners, but such abutting lot owner cannot take the mineral from beneath the highway so long as it remains a public one.²⁴ In the Missouri case just cited it was said: "The street having been dedicated to public use as a thoroughfare, no private party (not even the city itself) had any authority or right to use it for any other purpose."²⁵ If the public have a mere easement, then the abutting land owner owns the minerals beneath the highway;²⁶ and the same is true where the public acquire only an easement by the right of eminent domain.²⁷ Yet it would seem that the owner of mineral beneath a highway may remove it, if he can do so without interfering with the public in the use of such highway.²⁸ But this is a rule of little if any practical value in cases of oil and gas. For an oil or gas well must necessarily be an obstruction of the highway when sunk in it,

²⁰ *Union Coal Co. vs. City of La Salle*, 136 Ill. 119; 26 N. E. Rep. 506; 12 L. R. A. 326, an action to recover damages brought by a city against one taking the coal from beneath a street of the city. *Des Moines v. Hall*, 24 Ia. 234; *Hawesville v. Hawes*, 6 Bush. 232.

²¹ *Ontario Natural Gas Co. v. Gasfield*, 18 Ontario App. 626.

²² *Matthiesson, etc., Co. v. La Salle*, 117 Ill. 411; 2 N. E. Rep. 406; 8 N. E. Rep. 81.

²³ *Matthiesson, etc., Co. v. La Salle, supra*; *Friend v. Porter*, 50 Mo. App. 89.

²⁴ In *Union Coal Co. v. City of La Salle, supra*, the court declined to pass on the right of the city to sell the coal beneath the street. In *Ontario Natural Gas Co. v. Gasfield, supra*, a statute authorized a township to sell or lease the gas or oil beneath the surface of any public highway.

²⁵ *Tousley v. Galena, etc., Co.*, 24 Kan. 328; *Smith v. Rome*, 19 Ga. 89.

²⁶ *Smith v. Holloway*, 124 Ind. 329; 24 N. E. Rep. 886; *Kelly v. Donahoe*, 2 Metc. (Ky.) 482; *Evans v. Haefner*, 29 Mo. 141; *Goodtitle v. Alker*, 1 Burr. 143; *Holmes v. Bellingham*, 7 C. B. (N. S.) 329; *Berridge v. Ward*, 10 C. B. (N. S.) 400; 30 L. J. C. P. 218; 7 Jur. (N. S.) 876; 2 F. and F. 208; *Lyman v. Arnold*, 5 Mason 195; *Fisher v. Rochester*, 6 Lans. 225; *Robert v. Sadler*, 104 N. Y. 229; 10 N. E. Rep. 428.

²⁷ *Robert v. Sadler, supra*; *Perley v. Chandler*, 6 Mass. 453; *Old Town v. Dooley*, 81 Ill. 255; *Winchester v. Capron*, 63 N. H. 605; *Williams v. Kenney*, 14 Barb. 629. But of this the laws are conflicting as can be seen in citation 24.

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and especially the machinery used in sinking and operating it; ²⁹ and, therefore, it is practically impossible to make use of a highway in order to extract the oil or gas beneath its surface. As the public authorities only have the right to use the highway for the purposes of the public in traveling, they have no power to let any part of it for oil or gas operations, unless especially authorized by a statute to do so, and then only when the public own the fee. The owner of land dedicating it to the public for a highway may reserve the mineral beneath its surface; and in such an instance he may remove it; ³⁰ and if he convey the abutting property, his grantee is the owner of the mineral.³¹ Mineral beneath a navigable river or the sea belongs to the State.³²

§307. Reservation or exception subject to lien of judgment.

A reservation or exception of the gas or oil, or other mineral, beneath the surface of a tract of land conveyed is subject to a lien of a judgment taken against the grantor after the conveyance containing the reservation or exception has been made.³³

§308. Wife's interest in reservation — construction.

Husband and wife conveyed by deed certain real estate in fee simple, reserving to themselves the equal one-half part of the usual royalty of one-eighth of all the oil underlying the tract conveyed. In the deed it was expressly stated that they did not convey thereby such one-eighth of the oil. The grantee of

²⁹ *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117; 20 Amer. L. Reg. 342.

³⁰ *Dubuque v. Benson*, 23 Iowa 248.

³¹ *Tousley v. Galena, etc., Co.*, 24 Kan. 328; *Snoddy v. Bolen*, 122 Mo. 479; 25 S. W. Rep. 932.

³² 2 Bl. Com. p. 18. See *Pittsburgh, etc., Co. v. Lake Superior Iron Co.*, 118 Mich. 109; 7 C. N. W. Rep. 395.

In Ventura County, California, many oil wells have been drilled in the ocean, some as far as two hundred yards from the shore. In the Gulf of Mexico, off the Texas coast many miles, it is said that oil floating on the water can be readily discerned.

³³ *First National Bank v. Dow*, 41 Hun. 13. See *Thompson v. Matern*, 115 Pa. St. 501; 9 Atl. Rep. 70.

the tract of land afterwards leased it with the exclusive right to drill and operate for oil and gas, reserving one-eighth part of all the oil obtained from the premises as produced in the crude state. It was held that the reservation in the lease vested in the lessor one-eighth of the oil, but did not include the one-eighth which was outstanding in the wife of the original grantor.³⁴

§309. Location of oil claim on public lands.

Lands of the United States containing oil is subject to location the same as any other mineral land.³⁵ To render the land subject to location under the mining laws, the locator must know that oil exists on the land, the fact that surface indications were such as to point to the fact that oil might exist not being sufficient, or a mere conclusion, drawn from other facts, that it does exist is not a sufficient discovery. Nor is it sufficient that oil is known to exist in a nearby territory; or that another person other than the locator knows it exists; but the locator may so acquire his knowledge of the existence of oil, and so step into his shoes, as it were, as to render his title by location valid.³⁶

³⁴ *Harris v. Cobb*, 49 W. Va. 350; 38 S. E. Rep. 559.

³⁵ Act of February 11, 1897, 29 Stat. at Large 526; 2 Supp. R. S. U. S. 549.

³⁶ *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. Rep. 673; *Nevada Sierra Oil Co. v. Miller* 97 Fed. Rep. 681; *Gird v. California Oil Co.*, 60 Fed. Rep. 531; *Olive Land, etc., Co. v. Olmstead*, 103 Fed. Rep. 568; *Cosmos, etc., Co. v. Gray Eagle Oil Co.*, 104 Fed. Rep. 20.

For cases of solid mineral, on this point, see *Dower v. Richards*, 151 U. S. 658; 14 Sup. Ct. Rep. 452; *McCormick v. Sutton*, 97 Cal. 373; 32 Pac. Rep. 444; *Francoeur v. Newhouse*, 43 Fed. Rep. 236; *Northern Pacific Ry. v. Walker*, 47 Fed. Rep. 681; *Schendell v. Rogan*, 94 Tex. 585; 63 S. W. Rep. 1001; *McShane v. Kenkle*, 18 Mont. 208; 44 Pac. Rep. 979; 33 L. R. A. 851.

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CHAPTER XV.

PARTNERSHIPS.

- §310. Mining partnerships applicable to gas and oil operations.
- §311. Tenants in common not partners.
- §312. By agreement a mining association becoming an ordinary partnership.
- §313. Mining agreements that create ordinary partnerships.
- §314. Working a mine together creates a mining partnership.
- §315. Selection of a partner.— Sale of interest.
- §316. Tenants in common usually do not become partners.
- §317. Illustration of what makes a mining partnership.
- §318. Promoters.— Prospectors.
- §319. Life of mining partnership.— Dissolution.
- §320. Partition and accounting works a dissolution.
- §321. Majority control.
- §322. Power of partner in mining or oil enterprise.
- §323. Partner's lien.
- §324. Liability of incoming partner.
- §325. Each partner liable for all partnership debts.
- §326. Limited partnerships.

§310. Mining partnerships applicable to gas and oil operations.

A mining partnership in many things is radically different from an ordinary partnership. As this kind of a partnership has been expressly held applicable to oil or gas adventures,¹ although, not recognized in Pennsylvania,*¹ it will be necessary in this connection to discuss the rules of law applicable to them generally. In discussing the law with reference to mining partnerships, the subject must be approached, as it were, from two directions: One where joint owners of gas or oil lands operate them in order to extract gas or oil; and, second, where two or more jointly accept a lease of oil lands, or become jointly in-

¹ Childers v. Neeley, 47 W. Va. 70; borne, 159 Pa. St. 10; 28 Atl. Rep. 34 S. E. Rep. 828; 49 L. R. A. 468. 163.

*¹ Butler Savings Bank v. Os-

terested in one, and operate the lands leased with a view to extract the gas or oil.

§311. Tenants in common not partners.

As between themselves, co-tenants are not partners, whatever they may be to the outside world. A standard authority has made this comparison between co-ownership and co-partnership: "Speaking generally, and excluding all exceptional cases, the principal difference between co-ownership and partnership may be stated as follows: (1) Co-ownership is not necessarily the result of agreement. Partnership is. (2) Co-ownership does not necessarily involve community of profit or loss. Partnership does. (3) One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferer himself was before the transfer. A partner cannot do this. (4) One co-owner is not as such the agent real or implied of the others. The partner is. (5) One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has. (6) One co-owner of land is entitled to have it divided between himself and co-owners, but not to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold and the proceeds divided. (7) As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate. (8) Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one co-owner has against the others, are in many important respects different and less expensive than those which one partner has against his co-partners."²

²Lindley on Partnership 58.

§312. By agreement a mining association becoming an ordinary partnership.

By agreement the owners of a mine or of mining lands, or the owners of a lease of a mine or mining lands, may become partners in the ordinary sense of the term, not only as to themselves but as to strangers. The conduct of the parties may be such as to create such a partnership. Thus where certain mineral land had been held in co-ownership, and large quantities of iron ore had been extracted from the mines upon it; and extensive iron works had been erected by the owners of the land upon it, which were conducted as a trading concern, not only in the product of the mines, but of foreign iron and iron ore, manufactured at the works; it was held that the owners were a trading concern and an ordinary partnership.*² The terms of the agreement may be varied from time to time by the conduct of the parties.³ Such a partnership is governed by the ordinary incidents of a partnership. There is nothing in the mining business to forbid the creation of such a partnership. The confidential relations of an ordinary partnership, exist between the partners; and the withdrawal of one partner dissolves the partnership. The partners are strictly partners; not because of their common ownership of the mine, but as a result of their own agreement.⁴ "Tenants in common," said the Supreme Court of Illinois, "or joint tenants of a mine or quarry may or may not be partners, and the mine or quarry itself may or may not be a part of the common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of

*² *Crawshay v. Maule*, 1 Swanst 521; 1 Wils. 181; *Bradley v. Harkness*, 26 Cal. 69.

³ *Smith v. Jeyes*, 4 Beav. 503.

⁴ *Decker v. Howell*, 42 Cal. 636; *Stuart v. Adams*, 89 Cal. 367; 26 Pac. Rep. 970; *Lawrence v. Robin-*

son 4 Colo. 567; *State National Bank v. Butler*, 149 Ill. 575; 36 N. E. Rep. 1000; *Judge v. Braswell*, 13 Bush. 69; 26 Am. Rep. 185; *Burgan v. Lyell*, 2 Mich. 102; *Jefrey v. Smith*, 1 Jac. and W. 298.

land. The co-owners of mines may be partners, not only in the profits, but also in the mines themselves. The co-owners are then partners to all purposes, and their mutual rights and obligations are determined by the law of partnership as distinct from the law of co-ownership."⁵

§313. Mining agreements that create ordinary partnerships.

If two or more persons agree to engage in a mining adventure, to purchase a mine and share the gains and profits equally, they are ordinary trading partners. In such an instance each exercises his choice in selecting co-partners; and if any one sells out his interest, the partnership is dissolved, the purchaser and remaining partners becoming tenants in common of the mine and its working, subject to the rules applicable to mining partnerships.⁶ A., the owner of a coal mine, entered into an agreement with B. as follows: (1) A. was to have a royalty on every bushel of coal hoisted and sold, to be paid before anything else was paid, at the end of each month; (2) A. to have all control of the mine and the workings connected with it; (3) settlements to be made each month and profits divided or losses to be paid, one-fourth to or by B., the remainder to or by A.; (4) A. was to have an option on B.'s interest, if he desired to sell; (5) if at any time it should be considered by the parties advisable to connect tile works with the mines, the expense of doing so to be in the proportion of one to three, the profits or losses therefrom to be divided on the same basis. As to third parties who gave credit to the firm with notice of the agreement, A. and B. were held to be partners.⁷ Where the owner of a mining right agreed with owner of a mill for the reduction of ores that if the latter would reduce the ores taken out of the mining right, a certain proportion should vest in such mill owner and both

⁵ *State National Bank v. Butler*, 149 Ill. 575; 36 N. E. Rep. 1000; *Snyder v. Burnham*, 77 Mo. 52; *Smith v. Jeyes*, 4 Beav. 503; *Freeman v. Mememway*, 75 Mo. App. 611.

⁶ *Decker v. Howell*, 42 Cal. 636;

Quinn v. Quinn, 81 Cal. 14; 22 Pac. Rep. 284; *Lawrence v. Robinson*, 4 Colo. 567.

⁷ *State National Bank v. Butler*, 149 Ill. 575; 36 N. E. Rep. 1000, reversing 48 Ill. App. 648.

should bear the costs of the expense of mining, melting and shipping, each to bear a certain proportion, the profits of the enterprise to be shared between them — it was held that the agreement constituted them partners.⁸

§314. Working a mine together creates a mining partnership.

If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property. "Whatever may be the rights and liabilities," of tenants in common of a mine not being worked, said the Supreme Court of California, "it is clear that when the several owners unite and cooperate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnership. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself, one of which is that one person may convey his interest in a mine and business without dissolving the partnership. Still there may be a partnership in the working of a mine, subject to the rules relating to an ordinary partnership in trade. And this relation may be constituted either by express stipulation or by implication deduced from the acts of the parties. But in case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners, than would be necessary in the case of an ordinary partnership."⁹

⁸ *Ashenfelter v. Williams*, 7 Colo. App. 332; 43 Pac. Rep. 664; *Contra Vietti v. Nesbitt*, 22 Nev. 390; 41 Pac. Rep. 151.

⁹ *Skillman v. Lachman*, 23 Cal. 199; *Kahn v. Central Smelting Co.*, 102 U. S. 641; *Bissell v. Foss*, 114 U. S. 252; 5 Sup. Ct. Rep. 851, affirming 4 Fed. Rep. 694; 2 McCrary, 73;

Charles v. Eshleman, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; 2 Pac. Rep. 212; *Hawkins v. Spokane etc., Co.*, 2 Idaho 970; 28 Pac. Rep. 433; *Nolan v. Lovelock*, 1 Mont. 224; *Anaconda, etc., Co. v. Butte, etc., Co.*, 17 Mont. 519; 43 Pac. Rep. 924; *Randall v. Merideth*, 76 Tex. 669; 13 S. W. Rep. 576.

§315. Selection of a partner.— Sale of interest.

It is a cardinal rule of all ordinary partnerships that one about to engage in a partnership enterprise has the right to select his partners; in such a partnership the *delectus personae* has a part. But such is not the case in a mining partnership. In an ordinary partnership, if a new partner has been introduced, the old partnership is dissolved as to all the partners, where there is no agreement that it shall be continued.¹⁰ The conveyance of one partner of his interest to a stranger works a dissolution of the partnership. But such is not the case with a mining partnership, for a member of it may convey his interest to a stranger without dissolving the partnership, and the purchaser will become a partner in the enterprise, as much so as his vendor.¹¹ After referring to the case just cited, Justice Field of the Supreme Court of the United States, said: "This case settles two propositions: first, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates of his interest does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right of property of the other associates. Much less does a purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining members which is violated by the sale and assignment by one partner to a stranger, or to one of the associates of his share in the property of the association."¹² Therefore, the death of one of

The law with reference to mining partnerships has been codified in some States, as in California. Civil Code 1885. Secs. 2511-2520; Idaho, Rev. Stat. Secs. 3301-3309; Montana. Civil Code 1895, Secs. 3350-3359.

¹⁰ Heath v. Sanson, 2 B. and Ad.

291; Morss v. Gleason, 64 N. Y. 204.

¹¹ Kahn v. Central Smelting Co., 102 U. S. 641.

¹² Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. Rep. 851, affirming 4 Fed. Rep. 694, 2 McCrary, 73, Santa Clara, etc., Assn. v. Quicksilver

the partners does not dissolve the partnership; his heirs succeeding to his rights and place the same as a vendee of the interest, although they take no part in the management of partnership affairs, and do not hold themselves out as partners.¹³

§316. Tenants in common usually do not become partners.

There is no presumption where tenants in common work mines or mining territory together (and the same is true of oil territory) that they have created an ordinary co-partnership, either by their acts or by an agreement. If the course of dealings among co-tenants is naturally referable to the relation already existing among them, they, in the working of the mine or development of the mining territory, will be considered as co-tenants rather than partners.¹⁴ Thus where two joint owners of a lease of oil lands agree to carry on operations upon such land, each contributing a proportionate share of the expenses, they are not only between themselves not partners, but are not so as to third parties. They are simply working their own shares, responsible for their own acts, and are not subject to the laws of partnership.¹⁵ In the distribution of proceeds of an oil or mining adventure in the hands of a receiver, derived from an oil lease in the hands of tenants in common, they will be deemed such tenants, and no preference will be given creditors of the enterprise over individual creditors of either tenant, unless there was a partnership in fact, or by holding out.¹⁶ And

Mining Co., 17 Fed. Rep. 657; *Settembre v. Putnam*, 30 Cal. 490; *McCConnell v. Denver*, 35 Cal. 365; *Jones v. Clark*, 42 Cal. 180; *Smith v. Cooley*, 65 Cal. 46; 2 Pac. Rep. 880; *Chung Kee v. Davidson*, 102 Cal. 188; 36 Pac. Rep. 519; *Higgins v. Armstrong*, 9 Colo. 38; 10 Pac. Rep. 232.

¹³ *Taylor v. Castle*, 42 Cal. 367; *Nisbet v. Nash*, 52 Cal. 540; *Clark v. Ritter*, 59 Cal. 669; *Charles v. Eshleman*, 5 Colo. 107.

¹⁴ *Dunham v. Loverock*, 158 Pa. St. 197; 27 Atl. Rep. 990. See

Walker v. Tupper, 152 Pa. St. 1; 25 Atl. Rep. 172; *Brown v. Jaquette*, 94 Pa. St. 113; *Neill v. Shamburg*, 158 Pa. St. 263; 27 Atl. Rep. 992; *Taylor v. Fried*, 161 Pa. St. 53; 28 Atl. Rep. 993. See *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468.

¹⁵ *Butler Savings Bank v. Osborne*, 159 Pa. St. 10; 28 Atl. Rep. 163. It should be observed that in Pennsylvania such a thing as a "mining partnership" is unknown.

¹⁶ *Meridian National Bank v. McComica*, 8 Ohio Cir. Ct. Rep. 442.

where coal lands descended, one-third to the widow and two-thirds to children of the deceased, and the latter entered on the premises and worked the mines thereon until nearly exhausted, it was held that the widow could not hold the children liable to her as partners or trespassers, they at no time having excluded her from the premises; but could hold them as co-tenants.¹⁷ Where leases were taken in the individual names of the several lessees, it was said that "if the parties by parol associated themselves as partners, for the purpose of developing and operating it for the production of oil, it might thereby be converted into partnership assets, for the payment of partnership debts."¹⁸

§317. Illustration of what makes a mining partnership.

A. owned a tract of undeveloped coal land. He agreed with B. and C. that they might prospect for coal until they struck a particular seam, they two doing all the work, and to have two-thirds of the claim. After the seam was struck, the three, jointly, were to prosecute the work, A. paying one and B. and C. two-thirds of the expenses. It was held that this was a mining partnership; and did not create the relation of landlord and tenant.¹⁹ The proprietors of ditches in mining districts are tenants in common of real estate, and the rights in the ditch and in the profits arising from the sales of water are governed by the law of tenancy in common.²⁰ Two persons, being the owner of a two-thirds interest in a mine, verbally agreed with the plaintiff that they would furnish the tools and provisions and he should explore and develop the mine; and if it should prove valuable, they would give him an equal share of their interest. This was held to make a mining partnership.²¹ "The working of a mine under a bare mining right has been uniformly

¹⁷ *McGowan v. Bailey*, 179 Pa. St. 470; 36 Atl. Rep. 325.

¹⁸ *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608. See *Patrick v. Weston*, 22 Colo. 45; 43 Pac. Rep. 446.

¹⁹ *Henderson v. Allen*, 23 Cal. 519.

²⁰ *Bradley v. Harkness*, 26 Cal. 69; *McConnell v. Denver*, 35 Cal. 365.

²¹ *Settembre v. Putnam*, 30 Cal. 490.

considered by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested in such a right is that of a qualified partnership, and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it."²² A prospector and a hotel keeper agreed in writing "to share equal in any mine which we may buy or find from this date. I, B., offset my time against my board with M." It was held that this made them tenants in common of any mine bought at their common expense, or discovered and located pending this written agreement, and while it was performed by M. M. having failed, he went out of the hotel business, and did not and could not board B. It was also held that he was not entitled to any interest in mines purchased by B. with his own individual money.²³ A contract to work a mine, pay one-half of the expenses, and receive one-half of the product for the labor, does not make a mining partnership; it is simply a contract for services.²⁴ So where A. agreed with B. that if the latter would go to a certain county and produce a paying quartz mine, A. would pay his expenses and big wages, and if the mine proved to be a paying one, would give him, in addition, an interest in it, this was also held to be a mere contract of hiring and not a mining partnership.²⁵ Merely agreeing to work a mine together constitutes those thus agreeing merely mining partners, whether they own the mine²⁶ or only a right to work it.²⁷ So an association of persons merely for the purpose of operating mines and smelting works at a certain place is merely a mining partnership.²⁸ An agreement by four persons to secure a lease to a certain mining property, to work it jointly, each to have a one-fourth interest, and to share the expenses and profits equally, constitutes a mining partnership, and is not dissolved by the

²² *Smith v. Cooley*, 65 Cal. 46; 2 Pac. Rep. 880.

²³ *Miller v. Butterfield*, 79 Cal. 62; 21 Pac. Rep. 543.

²⁴ *Stuart v. Adams*, 89 Cal. 367; 26 Pac. Rep. 970.

²⁵ *Berry v. Woodburn*, 107 Cal. 504; 40 Pac. Rep. 802.

²⁶ *Charles v. Eshleman*, 5 Colo. 107; *Nolan v. Lovelock*, 1 Mont. 224.

²⁷ *Manville v. Parks*, 7 Colo. 128; 2 Pac. Rep. 212; *Harris v. Lloyd*, 11 Mont. 390; 28 Pac. Rep. 736.

²⁸ *Higgins v. Armstrong*, 9 Colo. 38; 10 Pac. Rep. 232.

sale of his share by one of their number.²⁹ So the same is true if they jointly employ a manager to run the mine and account to them for the proceeds of it.³⁰ So where one individual owned seven-eighths of a mine and another the remaining eighth, and the latter worked the mine, practically excluding the former, except inviting him to take part as a worker simply; it was held that they constituted a mining partnership under a statute providing that "those owning a majority of the shares or interests in a mining partnership have the right to control its methods of working," and that the former was entitled to an injunction restraining the latter from working the mine, except as he should direct.³¹ Where a statute provided if two or more persons should own or acquire a mining claim for the purpose of working it and extracting the ore therefrom; and if they should actually engage in working the mine, the transaction should constitute a mining partnership; it was held that where one individual owned three-fourths and another one-fourth interest in a mining claim, and the latter had alone worked the mine, that there was no mining partnership created.³² So taking a mortgage on a mine and the mining tools, the mortgagor to remain in possession, and at the time of each "clean up" the proceeds to be applied to pay the running expenses and the mortgage debt, will not make a mining partnership.³³

§318. Promoters — prospectors.

Promoters are not partners;³⁴ nor, generally, are provisional subscribers to a proposed partnership.³⁵ Nor are pros-

²⁹ *Meagher v. Reed*, 14 Colo. 335; 24 Pac. Rep. 681; 9 L. R. A. 455.

³⁰ *Slater v. Haas*, 15 Colo. 574; 25 Pac. Rep. 1089; *Lyman v. Schwartz*, 13 Colo. App. 318; 57 Pac. Rep. 735.

³¹ *Hawkins v. Spokane, etc., Co.*, 2 Idaho 970; 28 Pac. Rep. 433; *Hawkins v. Spokane, etc., Co.*, 3 Idaho —; 33 Pac. Rep. 40.

³² *Anaconda, etc., Co. v. Butte, etc., Co.*, 17 Mont. 519; 43 Pac. Rep. 924.

³³ *Chungkee v. Davidson*, 102 Cal. 188; 36 Pac. Rep. 519.

³⁴ *Doubleday v. Muskett*, 4 Moo. and P. 750; 7 Bing. 110; 9 L. J. (os) C. P. 35; *Atwood v. Small*, 7 B. and C. 390; *Higgins v. Hopkins*, 3 Exch. 163; 18 L. J. Exch. 113; 6 Ry. Cas. 75; *Wilson v. Holden* (otherwise *Bailey v. Haines*), 15 Q. B. 533; 19 L. J. Q. B. 73; 14 Jur. 835; *Sylvester v. McCuaig*, 28 Up. Can. C. P. 443.

³⁵ *Dickinson v. Valpy*, 10 B. and

pectors, joining in a joint enterprise strictly partners; and their transactions are not governed by the law of strict partnership.³⁶

§319. Life of mining partnership — dissolution.

A mining partnership will continue for the length of time agreed upon, or so long as the parties act together as a partnership. If no limit is fixed in the articles of agreement, it is determinable, under equitable restrictions, at pleasure; but the determination cannot defeat rights accrued under it while it was in force.³⁷ So if the partnership sell or otherwise dispose of all its property it is by the act of sale or disposition dissolved.³⁸ Thus where a co-partnership was formed to drill a gas well and supply its members with gas; and at the request of the defendant it disposed of its gas well to a third party, and the defendant agreed to furnish gas to its members at certain schedule prices, it was held that the sale of the property of the co-partnership worked the dissolution thereof, and that the individual members had not such a community of interest as to entitle them to sue jointly or as partners for the breach of the contract.³⁹ Quarrels and dissensions among the members of a partnership to an extent which prevents the harmonious working of the joint enterprise, is good ground for the dissolution of the partnership; and pending the action for a dissolution a receiver should be appointed for the partnership; for the court cannot put one partner or set of partners in possession to the exclusion of the other partner or set of partners.⁴⁰ In an action for a dissolution of a mining partnership the court will presume that all the partners have an equal share;⁴¹ and if it appear that one

C. 128; 5 M. and Ry. 126; 8 L. J. 183; *Thompson v. Bowman*, 6 Wall (os) K. B. 51; *Fox v. Frith*, 10 316; *Kennedy v. Porter*, 109 N. Y. M. and W. 131; *Car and M.* 502; 11 526; 17 N. E. Rep. 426; *Theriot v. L. J. Exch.* 336. *Michel*, 28 La. Ann. 107.

³⁶ *Boucher v. Mulverhill*, 1 Mont. 306.

³⁷ *Lawrence v. Robinson*, 4 Colo. 567.

³⁸ *Wells v. Ellis*, 68 Cal. 243; 9 Pac. Rep. 80; *Blaker v. Sands*, 29 Kan. 551; *Wilson v. Davis*, 1 Mont.

³⁹ *Pennville, etc., Co. v. Thomas*, 21 Ind. App. 1; 51 N. E. Rep. 351.

⁴⁰ *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468.

⁴¹ *Clark v. Brown*, 83 Cal. 181; 23 Pac. Rep. 289.

partner disposed of his interest it will be presumed that the purchaser became a member of the partnership, and was as much so as his vendor.⁴²

§320. Partition and accounting works a dissolution.

A member of a mining partnership cannot have a partition of the mining property without a dissolution of the partnership; nor can he have an accounting without the same result.⁴³

§321. Majority control.

In a mining partnership the majority in interest in the property control the enterprise, and may bind the property by contracts within the legitimate scope of the business; and all the partners will be bound by their acts.⁴⁴ Such would not be the case, however, if the object of the partnership was perverted and a business entered upon not within its legitimate scope.⁴⁵

§322. Power of partner in mining or oil enterprise.

Partnerships, whether mining partnerships or ordinary partnerships, are not commercial or trading partnerships; and one partner does not have the power to bind the partnership that he would have if they were commercial or trading partnerships.⁴⁶ He cannot bind the partnership except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless expressly authorized.⁴⁷ There is no presumption that he can bind the firm by the execution of a promissory note; and to render such an instrument binding on the firm, his power to bind it must be shown. This is true even though he be the man-

⁴² Taylor v. Castle, 42 Cal. 367; Nisbet v. Nash, 52 Cal. 540. Of course no such a presumption would prevail with respect to an ordinary partnership.

⁴³ Nisbet v. Nash, 52 Cal. 540; Clark v. Ritter, 59 Cal. 669.

⁴⁴ Dougherty v. Creary, 30 Cal. 290; 89 Am. Dec. 116; Nolan v.

Lovelock, 1 Mont. 224; Childers v. Neeley, 47 W. Va. 70; 34 S. E. Rep. 828; 49 L. R. A. 468; Hawkins v. Spokane, etc., Co., 2 Idaho 970; 28 Pac. Rep. 433.

⁴⁵ Childers v. Neeley, *supra*.

⁴⁶ Jones v. Clark, 42 Cal. 180.

⁴⁷ Jones v. Clark, *supra*.

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aging partner or agent of the firm.⁴⁸ But if a partner gives a promissory note for money loaned the partnership, the person loaning may usually recover for the amount loaned from the partnership, if he can show that it was used for the legitimate purposes of the partnership; but the cause of action is not based upon the note — the action is for money paid to the partnership use, and only so much can be recovered as was used by the partnership, at least this is true for the purpose of reimbursing the partner out of the partnership assets who signed the note and had it to pay.⁴⁹ One partner cannot borrow money upon the faith of the partnership credit, even upon the most urgent occasions,⁵⁰ unless expressly authorized so to do, or such is the usage;⁵¹ and such authority must be more than inferential — it must be specific.⁵² Money borrowed by a partner without authority, and accepted and used by the partnership, or used without any specific act of acceptance, may be recovered from such partnership.⁵³ But one partner has power to bind the corporation by buying materials to be used in its legitimate business, such as tools, fuses, powder, and the like, or in selling its products. So the superintendent of a mine may purchase such articles as are necessary for the conduct of the mine in the usual

⁴⁸ Skillman v. Lachman, 23 Cal. 199; Dickinson v. Valpy, 10 B. and C. 128; Brown v. Kidger, 3 H. and N. 853; Jones v. Clark, 42 Cal. 180; Decker v. Howell, 42 Cal. 636; Charles v. Eshelman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; Higgins v. Armstrong, 9 Colo. 38; 10 Pac. Rep. 232; Judge v. Braswell, 13 Bush. 69; 26 Am. Rep. 185; Shaw v. McGregory, 105 Mass. 96 (a quarrying firm); Pooley v. Whitmore, 10 Heisk. 629; 27 Am. Rep. 733; Green-slade v. Dower, 7 B. and C. 635; 1 M. and Ry. 640; 6 L. J. (os) K. B. 155.

⁴⁹ Brown v. Kidger, 3 H. and N. 853; 28 L. J. Exch. 66; *in re Ger-*

man Mining Co., 4 D. G. M. and G. 19; 24 L. J. Ch. 41; 18 Jur. 710; 23 L. T. (os) 200; 2 W. R. 543.

⁵⁰ Hawtayne v. Bourne, 7 M. and W. 595; 10 L. J. (N. S.) Exch. 224; 5 Jur. 118; Sims v. Brittain, 4 B. and A. 375; 2 N. and M. 594; Randall v. Merideth, 76 Tex. 669; 13 S. W. Rep. 576.

⁵¹ Ricketts v. Bennett, 4 C. B. 686; 17 L. J. (N. S.) C. P. 17; 11 Jur. 1062.

⁵² Burmester v. Norris, 21 L. J. (N. S.) Exch. 43; 6 Exch. 796; 17 L. T. 232; Randall v. Merideth, 76 Tex. 669; 13 S. W. Rep. 576.

⁵³ Tredwen v. Bourne, 6 M. and W. 461; 9 L. J. (N. S.) Exch. 290; 4 Jur. 747.

manner, without express authority.⁵⁴ But one partner cannot bind his partnership by the employment of an attorney to protect the mine's interest,⁵⁵ unless, perhaps, in a case of emergency where he had no time to consult his partners. Yet one partner may bind his firm by agreeing to pay for labor in the partnership enterprise,⁵⁶ unless there is an express agreement between the partners that he should have no such power and of which the employed person had due notice at the time of the employment.⁵⁷ The power to bind the partnership by a purchase does not extend so far as to authorize a partner of a firm engaged in operating coal lands to purchase additional coal lands; for it cannot be said that such power falls within the scope of the partnership business.⁵⁸ Mining partnerships, in the strict meaning of the term, except so far as is the general usage of persons engaged in similar pursuits, or the particular company has established a different rule, are governed by the law of ordinary partnerships.⁵⁹ These rules are applicable to oil or gas partnerships formed for the purpose of developing oil or gas lands or operating gas or oil wells.⁶⁰

⁵⁴ *Stuart v. Adams*, 89 Cal. 367; 26 Pac. Rep. 970; *Roberts v. Eberhart*, 1 Kay. 148; 23 L. J. Ch. 201; 22 L. T. 253; 2 W. R. 125.

⁵⁵ *Charles v. Eshleman*, 5 Colo. 107.

⁵⁶ *Burgan v. Lyell*, 2 Mich. 102; 55 Am. Dec. 53; *Potter v. Moses*, 1 R. I. 430; *Nolan v. Lovelock*, 1 Mont. 224.

⁵⁷ *Nolan v. Lovelock*, 1 Mont. 224.
⁵⁸ *Judge v. Braswell*, 13 Bush. 69; 26 Am. Rep. 185. Nor to the development of a mine to which he did not assent. *Chase v. Savage, etc., Co.*, 2 Nev. 9.

⁵⁹ *Jones v. Clark*, 42 Cal. 180.

⁶⁰ *Childers v. Neeley*, 47 W. Va. 76; 34 S. E. Rep. 828; 49 L. R. A. 468. Same points noted above are made in this case. See also *Ervin v. Masterman*, 16 Ohio Cir.

Ct. Rep. 62; 8 Ohio Dec. 516; *Baker v. Brennan*, 12 Ohio C. D. 211; 22 Ohio C. C. 241.

Several persons entered into a written agreement to sink a gas well, each to pay a certain sum which was stated in the agreement. One of their number was authorized to let the contract for the well, which he did. The funds thus subscribed were exhausted in the work, and no gas found. Some of the subscribers increased their subscriptions, and the well sunk deeper, but no gas found. It was held that those who did increase their subscriptions were not liable beyond the amount of such subscriptions. *Clark v. Rumsey*, 59 N. Y. App. Div. 435; 69 N. Y. Supp. 102; 52 N. Y. Supp. 417.

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§323. Partner's lien.

A partner, whether he be a member of a mining partnership⁶¹ or an ordinary partnership, who advances more than his share of money to operate or develop the mine, or the gas or oil lands, has a lien on his partner's share to the extent of his over-advancement, on final accounting.⁶² And where the partners are assignees of a lease, the same rule prevails, although the assignment be void, because not recorded according to the requirements of a statute.⁶³ Tenants in common have a like lien.⁶⁴ Even though a note be given individually for the partnership indebtedness, the lien is not lost.⁶⁵ If the partnership property be divided, the partner's lien is lost. And this was held true where the oil pumped was run into tanks of a pipe line company, and separate certificates of the amount of each partner was given him by the pipe line company, as per agreement; for in that instance the pipe line company was simply the agent of the partners to make the division.⁶⁶ So if a joint certificate of the amount received be issued, and one of the partners sell his share in it, he will lose his lien, especially if there is an agreement each may dispose of his share.⁶⁷ Where two partners excluded their fellow partner and leased the mine, it was held that the latter had a lien on the ore mined by the lessee for his share, although not on ore mined before the lessee acquired possession of the mine.⁶⁸

§324. Liability of incoming partner.

An incoming partner in an ordinary partnership is not personally liable for the debts of the partnership created before

⁶¹ *Morganstern v. Thrift*, 66 Cal. 577; 6 Pac. Rep. 689.

⁶² *Ervin v. Masterman*, 16 Ohio Cir. Ct. Rep. 62; 8 Ohio Dec. 516; *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. Rep. 328; 49 L. R. A. 468; *Burdon v. Barkas*, 3 Giff. 412; 31 L. J. Ch. 521; 8 Jur. (N. S.) 130; 5 L. T. 573; *Duryea v. Burt*, 28 Cal. 569.

⁶³ *Ervin v. Masterman*, *supra*.

⁶⁴ *Ervin v. Masterman*, *supra*.

⁶⁵ *Brown v. Beecher*, 120 Pa. St. 590; 15 Atl. Rep. 608.

⁶⁶ *Childers v. Neeley*, *supra*.

⁶⁷ *Ervin v. Masterman*, *supra*.

⁶⁸ *G. V. B. Mine Co. v. First National Bank*, 95 Fed. Rep. 23; 36 C. C. A. 633.

his connection with it; unless he agreed to be bound for them.⁶⁹ But a purchaser of a partner's share in a mining partnership takes it subject to the remaining partner's lien for moneys advanced, unless he is a purchaser in good faith, without notice, and for a valuable consideration. It will be presumed he had notice of the lien at the time he made the purchase; because the existence of the partnership puts him on notice.⁷⁰ And such new purchaser is liable for the debts of a mining partnership before he became a member; for his admission to the firm did not dissolve the firm, it continuing the same as it was before,—he simply taking his vendor's place.⁷¹ His liability is for the entire amount of the indebtedness.⁷²

§325. Each partner liable for all partnership debts.

In a mining partnership, a partner is liable the same as in an ordinary partnership — each partner is personally liable for the entire indebtedness of the firm.⁷³

§326. Limited partnerships.

Statutes have been enacted providing for limited partnerships, which are made applicable to mining adventures. It does not fall within the scope of this volume to discuss the law relating to limited partnerships, and therefore no farther notice will be taken of such statutes or decisions relating to them.⁷⁴

⁶⁹ Patrick v. Weston, 22 Colo. 45; 43 Pac. Rep. 446; Shireff v. Wilks, 1 East 48; Babcock v. Stewart, 58 Pa. St. 179; Wright v. Brosseau, 73 Ill. 381; Waller v. Davis, 59 Ia. 103; 12 N. W. Rep. 798; Guild v. Belcher, 119 Mass. 257; Fagan v. Long, 30 Mo. 222; Brown v. Beecher, 120 Pa. St. 590; 15 Atl. Rep. 608.

The retiring partner will continue to be liable for the old debts, the same as if he had not retired.

⁷⁰ Duryea v. Burt, 28 Cal. 569.

⁷¹ Jones v. Clark, 42 Cal. 180;

Contra, Patrick v. Weston, 22 Colo. 45; 43 Pac. Rep. 446.

⁷² Stuart v. Adams, 89 Cal. 367; 26 Pac. Rep. 970.

⁷³ Stuart v. Adams, 89 Cal. 367; 26 Pac. Rep. 970.

⁷⁴ Pennsylvania Act of June 2, 1874, P. L. 271; English Acts, 25 and 26 Vict. c. 89; 30 and 31 Vict. c. 131; 33 and 34 Vict. c. 104; 40 and 41 Vict. c. 26; 42 and 43 Vict. c. 76; 43 Vict. c. 19; 46 and 47 Vict. c. 30; 49 Vict. c. 23; 53 and 54 Vict. cc. 62, 63, 64; 56 and 57 Vict. c. 58; and 61 and 62 Vict. c.

26. See *Carter v. Producers, etc.*, 938; *Lumsden's case*, L. R. 4 Ch. Oil Co., 164 Pa. St. 463; 30 Atl. App. 31; 17 W. R. 65; *Cumming v. Prescott*, 2 Y. and C. Exch. 489; 2 Ch. App. 77; 15 W. R. 27; *Hunt's case*, 37 L. J. Ch. 278; 16 W. R. 472; *Weston's case*, L. R. 4 Ch. App. 20; 38 L. J. Ch. 49; 19 L. T. 337; 17 W. R. 62; *Gilbert's case*, L. R. 5 Ch. App. 559; 18 W. R. 308; *Lumsden's case*, L. R. 4 Ch. App. 31; 17 W. R. 65; *Cumming v. Prescott*, 2 Y. and C. Exch. 489; *Snell's case*, L. R. 5 Ch. App. 22; *Poole v. Middleton*, 29 Beav. 646; 9 Jur. (N. S.) 1262; 4 L. T. 631; 9 W. R. 758; *Nation's case*, L. R. 3 Eq. 77; 36 L. J. Ch. 112; 15 L. T. 308; 15 W. R. 143.

CHAPTER XVI.

MECHANIC'S LIENS.

- §327. Lubricating oil.
- §328. Labor or material must be furnished under a contract.
- §329. For what material furnished a lien may be obtained.
- §330. For what labor a lien may be obtained.
- §331. Overseer, custodian or superintendent entitled to a lien.
- §332. Upon what interest in land lien may be acquired.
- §333. Lien on oil well.
- §334. Forfeiture of lease.
- §335. Retroactive effect.
- §336. Priority of liens.
- §337. Notice of claim of lien.— Description of land.
- §338. Assignment of claims.
- §339. On plant of public gas company.
- §340. Oil refinery.— Paraffine works.

§327. Lubricating oil.

Oil furnished with which to oil machinery used in a mine or manufactory does not enhance the value of the mine or manufactory, nor add any value to it; so that a person furnishing oil of that kind cannot obtain a lien by virtue of the terms of a statute giving lien for material furnished such structures.¹

§328. Labor or material must be furnished under a contract.

The foundation of the right to secure a lien for labor performed or material furnished must be a contract with the owner of the land upon which the lien is sought to be enforced; and if there does not exist such a contract express or implied, the person claiming it must fail.² A contract with one not the owner

¹Standard Oil Co. v. Lane, 75 Colo. 187; 60 Pac. Rep. 354; 48 L. Wis. 636; 44 N. W. Rep. 644; 7 L. R. A. 340; Rico, etc., Co. v. Musgrave, 14 Colo. 79; 23 Pac. Rep. R. A. 191.

²Jurgenson v. Diller, 114 Cal. 458; Murtland v. Callihan, 2 Pa. 491; 46 Pac. Rep. 610; Wilkins v. Super. Ct. Rep. 340; 38 W. N. C. Abell, 26 Colo. 462; 58 Pac. Rep. 512.
612; Davidson v. Jennings, 27

or his agent does not bind the land or the improvements upon it; nor entitle a laborer to a lien for work done for a person he did not know to be the owner, and not to be working the mine as a representative of the owner.³ So a laborer employed by the owner's husband and another, who was not the wife's agent, and upon the assurance of the wife that her husband wanted the mine worked, and he would see that he was paid, is not entitled to a lien as against the wife under a statute giving a laborer a lien for work done on real estate under a contract with the owner of it.⁴ So a laborer working on a mine for one who has ousted the true owner can acquire no lien.⁵ Where the owner of a mine entered into a contract with an operator to operate the mine and make certain improvements on it, with the privilege of buying it, a certain percentage of the proceeds to be paid him, and to be credited on the purchase price in case the operator purchased the mine; and if he did not pay, the improvements and payments to be forfeited, which was in fact done and the mine turned back; it was held that the operator was the "agent" of the owner, and persons working for him or furnishing him materials for use in the mine were entitled to a lien.⁶ The amount to be paid for services need not be definitely agreed upon, if there is an agreement to pay.⁷

§329. For what material furnished a lien may be obtained.

Under the California statute the material furnished must be used on the mine to entitle the material man to a lien for its value.⁸ So the vendor of machinery for boring wells to a con-

³ Jurgenson v. Diller, *supra*.

⁴ Folsom v. Cragen, 11 Colo. 205; 17 Pac. Rep. 515.

⁵ Idaho Gold Mining Co. v. Winchell, 3 Idaho —; 59 Pac. Rep. 533.

⁶ Eaman v. Bashford (Ariz.), 37 Pac. Rep. 24. See a similar case where the operator was considered to be the tenant, and therefore no lien accrued. Jordan v. Myers, 126 Cal. 565; 58 Pac. Rep. 1061; Block

v. Murray, 12 Mont. 545; 31 Pac. Rep. 550. But see Maher v. Shull, 11 Colo. App. 322; 52 Pac. Rep. 1115, where a lien was enforced; and so Hines v. Miller, 122 Cal. 517; 55 Pac. Rep. 401. None enforced in Skym v. Weske, etc., Co (Cal.), 47 Pac. Rep. 110.

⁷ Bewick v. Muir, 83 Cal. 373; 73 Pac. Rep. 390.

⁸ Bewick v. Muir, 83 Cal. 373:

tractor sinking such wells is not entitled to a lien on the well he bores for such machinery's price, the machinery not being intended to become a part of the well, and in fact not becoming so.⁹ But one furnishing pipe for an oil well is entitled to a lien;¹⁰ and so one furnishing material for an oil tank.¹¹ One furnishing cars to be used in a coal mine is entitled to a lien under a statute giving any one a lien furnishing "any material, fixtures, engine, boilers, or machinery for any building or improvement on land." "A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc., and taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land."¹²

So a lien may be had for tools furnished to be used in a mine in California;¹⁴ or for materials furnished to build a dwelling house on the claim,¹⁵ even though built, in case of a shop, upon land contiguous to the mine if for the use of such mine, and a part of the mining company's property. The shop may be sold with the mine for the purpose of enforcing the lien.¹⁶ Where a statute gives a lien on a mine for "timbers or other material to be used in the mine" furnished by a material man, a lien may be taken for powder, steel, and candles furnished to be used in it.¹⁷ But a boiler, pump, engine, and machinery not situated in or in any way connected with the improvement, or a coal mine lease, used only for the purpose of drawing up coal and

23 Pac. Rep. 390; *Hamilton v. Delhi, etc., Co.*, 118 Cal. 148; 50 Pac. Rep. 378.

⁹ *Jareki Mfg. Co. v. Struther*, 8 Ohio Cir. Dec. 5; 14 Ohio C. C. 400.

¹⁰ *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 4 Ohio Cir. Ct. Dec. 248, 1 Ohio Dec. 153; *Haskell v. Gallagher*, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250.

¹¹ *Parker Land & Oil Co. v. Reddick*, 18 Ind. App. 616; 47 N. E. Rep. 848.

¹² *Central Trust Co. v. Sheffield, etc., Co.*, 42 Fed. Rep. 106.

¹⁴ *Malone v. Big Flat, etc., Co.*, 76 Cal. 578; 18 Pac. Rep. 772. A pump fastened to works furnish a good claim for a lien. *Goss v. Helbing*, 77 Cal. 190; 19 Pac. Rep. 277.

¹⁵ *Dickenson v. Bolyer*, 55 Cal. 285.

¹⁶ *Keystone Mining Co. v. Gallagher*, 5 Colo. 23. Lumber furnished for an oil refinery. *Short v. Miller*, 120 Pa. St. 470; 14 Atl. Rep. 374.

¹⁷ *Keystone Mining Co. v. Gallagher*, *supra*.

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water, will not fasten a lien on the mine.¹⁸ One furnishing natural gas to run an engine used in drilling an oil well is such a material man as gives him a lien for it as furnished.¹⁹

§330. For what labor a lien may be obtained.

Aside from the question who or what employee is entitled to a lien, and not discussing the right to a lien by an overseer, a superintendent, a manager or foreman, we will discuss in this section what services will entitle an employee or servant to a lien for labor rendered; premising our discussion by the remark that local statutes wholly govern the right. One working upon a house situated on a mining claim has been held entitled to a lien on the whole mine.²⁰ So of a shop.²¹ A statute providing that "all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor," gives a teamster a lien who hauls quartz to a quartz mill.²² One working on an oil tank, having a capacity of two or three hundred barrels, placed on a foundation built expressly for it, out of earth and lumber on the land of the person ordering it, is entitled to a lien under the general mechanic's lien law giving a lien upon any structure built upon the land, such oil tank being a fixture.²³ A statute giving a lien for work performed in making shafts, drifts, etc., for a mine does not give a lien for work performed in building a wagon road.²⁴ A blacksmith sharpening tools and drills and making pipes, and other necessary and like work on a mine, is entitled to a lien on the mine;

¹⁸ *Meistrell v. Reach*, 56 Mo. App. 243.

¹⁹ *Haskef v. Gallagher*, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250.

²⁰ *Dickenson v. Bolyer*, 55 Cal. 285. See *Hamilton v. Delhi Mining Co.*, 118 Cal. 148; 50 Pac. Rep. 378.

²¹ *Keystone Mining Co. v. Gallagher*, 5 Colo. 23; *Meistrell v. Reach*, 56 Mo. App. 243.

²² *In re Hope Mining Co.*, 1 Savy 710.

²³ *Parker Land & Oil Co. v. Reddick*, 18 Ind. App. 616; 47 N. E. Rep. 848; *Standard Oil Co. v. Sowden*, 55 Ohio St. 332; 45 N. E. Rep. 320; 36 Wkly. L. Bull. 306; 37 Wkly. L. Bull. 3; *Contra Seiders, etc., Works v. Lewis, etc., Co.*, 7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80.

²⁴ *Williams v. Toledo Coal Co.*, 25 Ore. 426; 36 Pac. Rep. 159.

for such tools and machinery used in developing a mine are to be considered, while so used, as affixed to it under the Code of California.²⁵ In California a contractor for the labor of others in a mine at a fixed rate for each man per day is entitled to a lien for their labor.²⁶ One hauling pipe to be used in an oil well is entitled to a lien.²⁷ But a statute giving a lien upon all tools, machinery and stock located in or about a mill or shop, to all labors employed in and about it, in case of insolvency, will not give a lien upon a boiler, engine, shafting, beam, derrick, reel, ropes and drill, when put in place and action, but not connected with any mill or shop.²⁸

§331. Overseer, custodian or superintendent entitled to a lien.

Under the statute providing that "every person performing labor" for a mining company doing business in the State shall be entitled to a lien on all its property, taking precedence over all other debts or judgments against the company, an overseer and custodian of the mine and property of such a company is entitled to a lien for his services.²⁹ So it has been held that a superintendent of a mine rendering service in planning and superintending development of mines, and in planning and superintending the erection of a mill and machinery for them, performed work and labor in or upon the property of a mining company, such as entitled him to a lien for his services, but not for services in keeping books and disbursing funds.³⁰ Of a foreman it is said: "He certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his directions."³¹ Of a similar in-

²⁵ *Malone v. Big Flat, etc.*, 76 Cal. 578; 18 Pac. Rep. 772.

²⁶ *Malone v. Big Flat Gravel Co.*, 76 Cal. 578; 18 Pac. Rep. 772.

²⁷ *McElwaine v. Hosey*, 135 Ind. 481; 35 N. E. Rep. 272.

²⁸ *Ibid.*

²⁹ *McLaren v. Byrnes*, 80 Mich. 275; 45 N. W. Rep. 143.

³⁰ *Rara Avis' Gold & Silver Mining Co. v. Bouscher*, 9 Colo. 385; 12 Pac. Rep. 433; *Palmer v. Uncas Mining Co.*, 70 Cal. 614; 11 Pac. Rep. 666.

³¹ *Capron v. Strout*, 11 Nev. 304.

stance the Supreme Court of the United States said: "He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. The services rendered by him were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mines. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears from the findings, to have performed services similar to those required of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman; and occasionally in an emergency, as for example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of such duties may well be called work and labor, and that the District Court rightfully declared the person who performed them entitled to a lien, under the law of the Territory."³² So the superintendent of the construction of a gas pipe line, having full supervision of the digging of the trenches, the laying of gas pipes, etc., with full authority to hire and discharge employees, being required to walk along the pipe lines, test the wells, which required him to handle wrenches and tools for short periods of time, was held entitled to a lien under a statute giving "laborers and employees" liens on the property of an insolvent corporation.³³ On the other hand it has been held that a general manager and

³² *Flagstaff, etc., Co. v. Cullins*, *Stryker v. Cassidy*, 76 N. Y. 50. 104 U. S. 176, affirming *Cullins v.* ³³ *Pendergast v. Yandes*, 124 Ind. *Flagstaff, etc., Co.*, 2 Utah 219; 159; 24 N. E. Rep. 724.

superintendent of a mine who does not perform bodily toil is not entitled to a lien upon it under a statute giving a lien to one "who performs labor in any mining claim."³⁴

§332. Upon what interest in land a lien may be acquired.

In Indiana the lien attaches only to the interest the person against whom it is sought to enforce has in the land. This is made so by the express words of the statute. It may be enforced against the lessee's interest, when the work is performed for him; but does not bind the lessor's interest.³⁵ In Missouri a laborer for a mere licensee, to operate on land, does not get a lien on the land.³⁶ In Montana the employee of a leasehold cannot acquire a lien against the mining property.³⁷ In Iowa he can;³⁸ so in Pennsylvania,³⁹ in Ohio,⁴⁰ and in Missouri. In the case of a mine, a lien does not attach to the interest of the lessee if no minerals be found.⁴¹

§333. Lien on oil well.

In Indiana a statute provided that "all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, reservoir, system of waterworks, or other structure;"

³⁴ *Boyle v. Mountain, etc., Co.* N. M.; 50 Pac. Rep. 347. Same result. *Smallhouse v. Kentucky, etc., Co.*, 2 Mont. 443.

³⁵ *Hopkins v. Hudson*, 107 Ind. 191; 8 N. E. Rep. 91; *St. Clair Coal Co. v. Martz*, 75 Pa. St. 384; *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517; 25 C. C. A. 46.

³⁶ *Springfield Foundry, etc., Co. v. Cole*, 130 Mo. 1; 31 S. W. Rep. 922, reversing 57 Mo. App. 11. So in Oregon. *Stinson v. Hardy*, 27 Ore. 584; 41 Pac. Rep. 116; formerly so in Colorado; *Wilkins v. Abell*, 26 Colo. 462; 58 Pac. Rep. 612; *Little Valeria, etc., Co. v. Ingersoll*, 14 Colo. App. 240; 59 Pac. Rep. 970;

Schweizer v. Mansfield, 14 Colo. App. 236; 59 Pac. Rep. 843.

³⁷ *Pelton v. Minah, etc., Co.*, 11 Mont. 281; 28 Pac. Rep. 310; *Block v. Murray*, 12 Mont. 545; 31 Pac. Rep. 550.

³⁸ *Mitchell v. Burwell*, 110 Ia. 10; 81 N. W. Rep. 193.

³⁹ *McElwaine v. Brown* (Pa.); 11 Atl. Rep. 453; *Thomas v. Smith*, 42 Pa. St. 68.

⁴⁰ *Acklin v. Woltermeier*, 19 Ohio C. C. Rep. 372; 10 Ohio C. D. 629.

⁴¹ *Blindert v. Kreiser*, 81 Wis. 174; 51 N. W. Rep. 324; *Colvin v. Weimer*, 64 Minn. 37; 65 N. W. Rep. 1079.

might have a mechanic's lien. It was held that this statute gave a lien for work performed in drilling an oil well, and for natural gas furnished the contractor as fuel with which to run the engine by which power was supplied for drilling the well. It was considered that the oil well, boilers, engine, shafting, beam, derrick, reel, ropes and drill when put in place and action, in drilling a gas well, constituted a "structure" within the meaning of the statute. "If such appliances for making a gas well be a structure, it would seem that a completed oil well with all its appliances, including the drilled hole in the earth, with its tubing, should also be regarded as within the meaning to which the language of the statute may legitimately be expanded in the application by the courts."⁴²

§334. Forfeiture of lease.

A lien for work and labor in putting up a structure for a lessee on his lease, to be used in the operation of a gas and oil well, is not impaired by the forfeiture of the lease, where the lien attaches prior to the forfeiture, nor by the failure of the lessee to drill a well in accordance with the terms of the lease, where a statute provides that "where the owner has only a leasehold interest, or the land is incumbered by mortgage, the lien so far as concerns the buildings erected by said lien holder is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and removal within" a certain specified number of days after the sale.⁴³

⁴² *Haskell v. Gallagher*, 20 Ind. App. 224; 50 N. E. Rep. 485; 67 Am. St. Rep. 250; *McElwaine v. Hosey*, 135 Ind. 481; 35 N. E. Rep. 272; *Hoppes v. Baie*, 105 Ia. 648; 75 N. W. Rep. 495 (a water well). *Contra*, *Omaha, etc., Co. v. Burns*, 49 Neb. 229; 68 N. W. Rep. 492; *Vandergrift's Appeal*, 83 Pa. St. 126; *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 1 Ohio Dec. 153; 4 Ohio Cir. Ct. Dec. 248. See *Acklin*

v. Waltermier, 19 Ohio C. C. Rep. 372; 10 Ohio C. D. 629. Doubtful in *Orth v. West & East Oil Co.*, 159 Pa. St. 388; 28 Atl. Rep. 180. In drilling a well to find minerals, and no minerals were found, it was held that no lien attached to the lessee's interest. *Colvin v. Weimer*, 64 Minn. 37; 65 N. W. Rep. 1079.

⁴³ *Montpelier, etc., Co. v. Stephenson*, 22 Ind. App. 175; 53 N. E. Rep. 444. Unless the statute gives

§335. Retroactive effect.

A law giving a lien will not be so construed as to give a retroactive effect. Thus where a statute did not give a lien against a leasehold interest in the land, but was so amended as to give a lien to laborers working for the lessee against the lessor's interest in the land, it was held that the statute as amended did not apply to work performed before it was amended.⁴⁴

§336. Priority of liens.

Statutes giving mechanics and laborers liens often provide that no lien on a structure shall have preference, when the several holders contributed to the same results and their labors all contributed to it. In Ohio a statute provided that where several persons obtained liens on the same "job," they should have no priority among each other. It was held that the construction of an oil well was a "job," and all lien-holders thereon were on an equality.⁴⁵ In Michigan a miner's lien accrues as the labor is performed; and where labor has been performed before the levy of a writ of attachment, the laborer is entitled to priority over it, although he did not file his notice of a claim until after the levy.⁴⁶ But a mortgage recorded before the contract for labor has been made takes precedence of the labor's lien.⁴⁷ A statute may provide that a labor's or material man's

a lien holder the right to sell and remove the fixtures he places upon the leased premises, he cannot do so and his only remedy is against the premises and fixtures or real estate. *Chicago Smokeless Fuel Gas Co. v. Lyman*, 62 Ill. App. 538.

⁴⁴ *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517; 25 C. C. A. 46; *Gardner v. Resumption, etc., Co.*, 4 Colo. App. 271; 35 Pac. Rep. 674; *Hunter v. Savage, etc., Co.*, 4 Nev. 153.

⁴⁵ *Devine v. Taylor*, 12 Ohio Cir. Ct. Rep. 723; 4 Ohio Cir. Ct. Dec. 248; 1 Ohio Dec. 153.

⁴⁶ *McLaren v. Byrnes*, 80 Mich. 275; 45 N. W. Rep. 143; *Peatman v. Centerville, etc., Co.*, 105 Ia. 1; 74 N. W. Rep. 689 (a judgment); *Standard Oil Co. v. Sowden*, 55 Ohio St. 332; 45 N. E. Rep. 320 (a mortgage); *Sicardi v. Keystone Oil Co.*, 149 Pa. St. 639; 24 Atl. Rep. 163; *Trust v. Miami Oil Co.*, 10 Ohio C. D. 372; 19 Ohio C. C. Rep. 727.

⁴⁷ *Folsom v. Cragen*, 11 Colo. 205; 17 Pac. Rep. 515; *Rawlins v. New Memphis, etc., Co.*, 105 Tenn. 268; 60 S. W. Rep. 206.

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lien shall take precedence of a prior recorded mortgage.⁴⁸ The lien attaches when the work is commenced or the material furnished.⁴⁹

§337. Notice of claim of lien — description of land.

The notice of the lien, or of an intention to claim one, must so describe the property upon which the lien is claimed as to identify it, or the lien will be void.⁵⁰ An incorrect description of metes and bounds will render the notice invalid.⁵¹ The precise words of the statute need not be followed; substantially equivalent expressions will suffice.⁵² Where a statute required among other things, "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," to be stated, a failure to insert in the claim a statement by whom the claimant was employed renders it fatally defective.⁵³ But a statement that the claimant was employed by the defendant company without naming the company's agent, is sufficient.⁵⁴ Where a statute requires "a statement of the terms, time given, and conditions of the labor contract, and also a description of the property to be charged with the lien sufficient for identification," to be inserted in the claim, if there is set forth in the claim the kind and number of days of labor performed, the dates between which it was performed, with the aggregate sum then due, and "that the terms of payment for said labor were cash, as soon as said labor was performed," and a description of the property by name and the district, where it is well known, that will be sufficient.⁵⁵ Under the statute just referred to as against the interest of one who enters and operates

⁴⁸ Warren v. Sohn, 112 Ind. 213; 13 N. E. Rep. 863.

⁴⁹ Bristol, etc., Co. v. Bristol, etc., Co., 99 Tenn. 371; 42 S. W. Rep. 19.

⁵⁰ Fernandez v. Burleson, 110 Cal. 164; 42 Pac. Rep. 566; Rico, etc., Co. v. Musgrave, 14 Colo. 79; 23 Pac. Rep. 458; Tredinnick v. Red Cloud, etc., Co., 72 Cal. 78; 13 Pac. Rep. 152.

⁵¹ Fernandez v. Burleson, *supra*.

⁵² Ascha v. Fitch (Cal.), 46 Pac. Rep. 298; Bewick v. Muir, 83 Cal. 373; 23 Pac. Rep. 390.

⁵³ Ascha v. Fitch, *supra*.

⁵⁴ Malone v. Big Flat Gravel Co., 76 Cal. 578; 18 Pac. Rep. 772.

⁵⁵ Tredinnick v. Red Cloud, etc., Co., 72 Cal. 78; 13 Pac. Rep. 152.

several claims as one mine, they may be treated as a single claim, and declared upon as such.⁵⁶

§338. Assignment of claims.

A claim, secured by a mechanic's lien, may be assigned; and the assignment will carry the lien so that the assignee can enforce it.⁵⁷ And if the statute provide for a penalty and attorney's fees, the assignee may also recover these.⁵⁸

§339. On plant of public gas company.

A lien may be acquired on the plant of a gas company furnishing gas to a municipality for work and materials furnished as readily as upon an entirely private concern. And the fact that the public might be inconvenienced is not a bar to the enforcement of the lien.⁵⁹ The entire plant of the company is subject to the lien, including pipes laid in the streets of the municipality and on the interest of the company in the premises.⁶⁰ By special agreement, one furnishing machinery for a gas plant may retain a lien on the machinery he furnishes, for its price, after it is affixed to the company's premises.⁶¹ And even when it is held that a lien cannot be acquired upon the

⁵⁶ *Hamilton v. Delhi Mining Co.*, 118 Cal. 148; 50 Pac. Rep. 378.

⁵⁷ *Malone v. Big Flat Gravel Co.*, 76 Cal. 578; 18 Pac. Rep. 772.

⁵⁸ *Mitchell v. Burwell*, 110 Ia. 10; 81 N. W. Rep. 193.

⁵⁹ *Wood v. Holly Mfg. Co.*, 100 Ala. 660; 13 So. Rep. 948; *Badger Lumber Co. v. Marion, etc., Co.*, 48 Kan. 187; 30 Pac. Rep. 117; affirming 29 Pac. Rep. 476; *Oconto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603; *National Foundry Co. v. Oconto Water Co.*, 52 Fed. Rep. 43; *Steger v. Artic Refrigerator Co.*, 89 Tenn. 453; 14 So. Rep. 1087; 11 L. R. A. 580.

⁶⁰ *National Foundry v. Oconto*

Water Co., 52 Fed. Rep. 43; *Oconto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603; *Bristol Goodson, etc., Co. v. Bristol, etc., Co.*, 99 Tenn. 371; 42 S. W. Rep. 19; *Rawlings v. New Memphis, etc., Co.*, 105 Tenn. 268; 60 S. W. Rep. 206; *Goss v. Helbing*, 77 Cal. 190; 19 Pac. Rep. 277; *Light Co. v. Gill*, 14 Pa. Co. Ct. Rep. 6; *McNeal, etc., Co. v. Howland*, 111 N. C. 615; 16 S. E. Rep. 857; 20 L. R. A. 743. But see *Eufaula Water Co. v. Addystone Water Co.*, 89 Ala. 522; 8 So. Rep. 25.

⁶¹ *Wood v. Holly Mf. Co.*, 100 Ala. 326; 13 So. Rep. 948.

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premises of a gas company supplying a city with gas, a lien may be retained on machinery sold conditionally to the gas company.⁶² Where a lien cannot be obtained on the plant itself, because of the fact that the company has no interest in the premises sufficient for a lien, and a statute gives the person furnishing machinery a lien on such machinery and the right to remove it, yet he cannot acquire a lien on the pipes in the street connected with the plant, they not being subject to a lien; for the plant is an integer, and cannot be separated under a lien.⁶³ Yet when a company was conducting a plant for a city, and gave a trust deed on the machinery to the vendor of it, providing that the machinery should not be considered as fixtures until it was paid for; it was held that public necessity required the plant and the company's franchise, where it was in the hands of a receiver, to be sold together, and that the trust deed should be a specific lien thereon to the extent of the value of the machinery.⁶⁴

§340. Oil refinery — paraffine works.

An oil refinery is a building, within the meaning of that term as used in a statute; and a lien may be secured upon it by a material man furnishing timbers for it.⁶⁵ And although the several structures constituting the refinery consist of appliances put up in the open air, and are not enclosed under a roof or shed, yet a material man's lien for furnishing material for any one of such appliances extends to the whole refinery.⁶⁶ Paraffine works are part of a refinery.⁶⁷

⁶² *Holly Mf. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879.

⁶³ *Oconto Water Co. v. National Foundry*, 59 Fed. Rep. 19; 7 C. C. A. 603.

⁶⁴ *McNeal Pipe, etc., Co. v. Woltman*, 114 N. C. 178; 19 S. E. Rep. 109.

⁶⁵ *Short v. Miller*, 120 Pa. St. 470; 14 Atl. Rep. 374.

⁶⁶ *Titusville Iron Works v. Keystone Oil Co.*, 130 Pa. St. 211; 18 Atl. Rep. 739; *Linden Steel Co. v. Imperial Refining Co.*, 138 Pa. St. 10; 20 Atl. Rep. 867, 869.

⁶⁷ *Sicardi v. Keystone Oil Co.*, 149 Pa. St. 139; 24 Atl. Rep. 161, 163.

CHAPTER XVII.

MORTGAGES.

Art. 1. Mortgage of oil or mining property.

Art. 2. Mortgage of gas plant.

ARTICLE 1.

MORTGAGE OF OIL OR MINING PROPERTY.

§341. Leasehold may be mortgaged by lessee.

§342. Lessor may mortgage premises.

§343. Mortgage of oil or mining lease in Pennsylvania.

§344. Mortgagor may remove gas, oil and minerals.

§345. Mortgagor in possession.

§346. Mortgagee in possession.

§347. Mortgagee in possession, English rule.

§341. Leasehold may be mortgaged by lessee.

A leasehold estate may be mortgaged, even though it be an estate only for years;¹ and the same is true of a lease to take out mineral, gas or oil; for such a lease gives a freehold interest in the land.² The mortgage must be recorded, according to the registry laws of the State where the lands leased lie; and if recording is necessary to the validity of an ordinary mortgage, then a mortgage of a leasehold estate must be recorded.³ The mortgagee is entitled to the benefit of any covenants in a lease, as for a renewal; and if there be a renewal, his mortgage at-

¹ *Walton v. Cronly*, 14 Wend. 63;

Astor v. Miller, 2 Paige Ch. 68;

Astor v. Hoyt, 5 Wend. 603; *Childs*

v. Clark, 3 Barb. Ch. 52; *Broman*

v. Young, 35 Hun 173.

² *Heller v. Dailey*, 28 Ind. App.

555; 63 N. E. Rep. 490.

³ *Lester v. Hardesty*, 29 Md. 50.

taches to the renewed lease.⁴ Where the royalties on coal and iron mined on the premises were to be paid before the coal and iron was removed from the premises, it was held that the lessee was entitled to be paid before the mortgagee of the lessee, out of the funds of the lessee's agents arising from a sale of coal and iron and paid into court. The lessee was treated as a mortgagor in possession who was entitled to the rents and profits as against the mortgagee.⁵ In Ohio it has been held that a real estate mortgage, given by the lessee, will not bind the leasehold or the lessee's interest, because such a leasehold is not real estate or an interest in the freehold; and the question was left open whether a chattel mortgage would bind it.⁶ The same was also held in New York.⁷

§342. Lessor may mortgage premises.

A lessor may mortgage the premises leased, but the mortgage will be subject to the terms of the lease, aside from the question of accepting a mortgage without notice of such lease. The mortgagee has only the rights of the mortgagor as against the lessee, his assignee or sublessee.⁸ Until default in the provisions of the mortgage, at least, the mortgagor, if in possession, is entitled to the rents and profits due under the lease, and the mortgage is not a lien upon them.⁹ It makes no difference whether the mortgage was executed before or after the date of the lease; payment to the mortgagor is good until the mortgagee interferes.¹⁰ Where the law of the State is that the mortgagee

⁴ *Slee v. Manhattan Co.*, 1 Paige Ch. 48.

⁵ *Childs v. Hurd*, 32 W. Va. 66; 9 S. E. Rep. 362.

⁶ *Meridian, etc., Bank v. McConica*, 8 Ohio Cir. Ct. Rep. 442; 4 Ohio Dec. 106.

⁷ *Broman v. Young*, 35 Hun 173; *First National Bank v. Dow*, 41 Hun 13.

⁸ *Hemphill v. Giles*, 66 N. C. 512.

⁹ *Bank of Ogdensburgh v. Arnold*, 5 Paige Ch. 38; *Fitchburg, etc., Corp. v. Melven*, 15 Mass. 268; *Long v. Wade*, 70 Me. 358; *Clarke v. Curtis*, 1 Gratt. 289; *McKircker v. Hawley*, 16 Johns. 289.

¹⁰ *Trent v. Hunt*, 9 Exch. 14, 22; *Edwards v. Woodbury*, 1 McCray 429; 3 Fed. Rep. 14.

shall not be entitled to take possession of the mortgaged premises prior to a foreclosure, the mortgagor may take a valid assignment of the rents and profits, and the assignee may enforce his right to take them.¹¹ In such a case the mortgagor is entitled to the rents accruing until there has been a foreclosure, a sale, and the title to the mortgaged premises has vested in the purchaser. And where the lessee was the purchaser, but there was a delay of several weeks after the sale before he received his deed, during which a quarter's rent fell due, it was held that the lessor (and mortgagor) was entitled to such rent.¹² If the mortgagee take a lease of the premises from his mortgagor, and afterwards the equity of redemption be sold he can not insist, as against the purchaser, that the rents be set off against the mortgage debt.¹³ After a mortgage has been given, the mortgagor cannot make a lease that will be binding on the mortgagee.¹⁴ If the mortgagee enter for breach of the condition of the mortgage, and accept rent from the lessee, the latter becomes his tenant under a tenancy from year to year, and not for the term as fixed by the lease.¹⁵ But if he do not so accept rent, he may treat the lessee as a trespasser.¹⁶ The lessee can not compel the mortgagor to pay off the mortgage; his remedy being an ordinary action for damages, if he be dispossessed under it by reason of its terms.¹⁷ But if the mortgagee take possession in a State where no statute authorizes him to do so, on default of the mortgagor, and he takes it by reason of the consent of the latter, a verbal agreement of the lessee to pay such mortgage the rent under the lease, does not continue the existing tenancy, nor put him in the place of the lessor. If held valid at all, it must be held to be a new agreement.¹⁸ If the lessee covenants in the lease to pay the royalties to the person holding a

¹¹ *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Argall v. Pitts*, 78 N. Y. 239.

¹² *Clason v. Corley*, 5 Sandf. 447.

¹³ *Scott v. Fritz*, 51 Pa. St. 418. See *Taliaferro v. Gay*, 78 Ky. 496.

¹⁴ *McDermott v. Burke*, 16 Cal. 580; *Russem v. Wanser*, 53 Md. 92; *Henshaw v. Wells*, 9 Humph. 568.

¹⁵ *Hughes v. Bucknell*, 8 C. and P. 566.

¹⁶ *Birch v. Wright*, 1 T. R. 378; *Thunder v. Belcher*, 3 East 449; *Rogers v. Humphreys*, 4 Ad. and El. 299.

¹⁷ *Costigan v. Hastler*, 2 Sch. and Lef. 160.

¹⁸ *Hogsett v. Ellis*, 17 Mich. 351.

mortgage on the premises, such person may maintain an action against him to recover such royalties, irrespective of the fact that such lease is under seal, under the modern system of procedure.¹⁹

§343. Mortgage of oil or mining lease in Pennsylvania.

In Pennsylvania statutes control the mortgaging of mining leases. By the Act of April 27, 1855²⁰ it is declared "to be lawful for every lessee for term of years of any colliery, mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, with all buildings, fixtures and machinery thereon, to the lessee belong [ing] and thereunto appurtenant, with the same effect as to the lessee's interest and title, as in the case of the mortgaging of a freehold interest and title as to lien, notice, evidence and privity of payment." It also provides that the mortgage must "be in like manner acknowledged and placed of record in the proper county, together with the lease, and that such mortgage shall in nowise interfere with the landlord's rights, privity or remedy for rent, and such mortgages may be sued out as in other cases." A subsequent Act (April 3, 1868)²¹ provides that "in all cases of mortgages upon leasehold estates, the mortgagees shall have the same remedies for the collection thereof which mortgagees of real estate have under the laws of this commonwealth." A third Act (May 13, 1876,)²² provides "whenever a lease of term of years shall have heretofore been or shall hereafter be mortgaged under the Act of April 27, 1855, . . . if the lease shall be recorded in the deed books of the proper county before the execution of the mortgage or shall thus be recorded

¹⁹ *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. Rep. 391.

If the lease be taken after a mortgage has been placed on the premises by the lessor, it is subject to the mortgage, even though the mortgage was contested; and if its validity be sustained, he is not entitled to claim the proceeds of the mine while operated by a receiver

appointed in a foreclosure suit, as against the mortgagee, on the ground that he expended money to render them productive. *G. B. Ming. Co. v. First National Bank*, 95 Fed. Rep. 35; 35 C. C. A. 510, affirming 89 Fed. Rep. 449.

²⁰ P. L. 369.

²¹ P. L. 57, Sec. 1.

²² P. L. 160.

at the time of recording the mortgage, such recording shall be deemed a sufficient compliance with the requirements of the Act with reference to recording such lease." And it also provides that a "full distinct reference" shall "be made in said mortgage to the book and page where the said lease is recorded." Under the first Act it has been held, in order to give priority of the mortgagee over an execution creditor of the mortgagor, the lease must be recorded with the mortgage.²³ And under this statute, recording the mortgage with a copy of the lease, and referring to the latter as recorded with a former mortgage, it was held to be a substantial compliance with the act.²⁴ The Act of 1868 applies to actions begun before it was enacted, to enforce the collection of mortgages in the same manner as it provides for.²⁵ Of course, all three statutes must be construed in *pari materia*.²⁶ The Act of 1855 applies to leases for oil or gas, although enacted before either was discovered.²⁷ The mortgage and lease need not bear the same date, if recorded at the same time in the same connection.²⁸ If the mortgage cover the personal property on the leasehold premises, the mortgagee may follow and recover it wherever he finds it, notwithstanding his debt is not due at the time he claims it.²⁹ Neither the Act of 1855 nor that of 1868 embrace a leasehold vesting a freehold interest in the mortgagor.³⁰ The Acts of 1855 and 1876 apply to a leasehold interest in a city lot for a term of years, the lessee paying a yearly rent and being required to erect a building thereon.³¹ The word "fixture" as used in the Act of 1855 is not to be construed in its strict sense, but in a comprehensive way, and includes mine cases and all such machinery and ap-

²³ Sturtevant's Appeal, 34 Pa. St. 149; Glading v. Frick, 88 Pa. St. 460. See First National Bank v. Sheaffer, 149 Pa. St. 236; 24 Atl. Rep. 221.

²⁴ Ladley v. Creighton, 70 Pa. St. 490.

²⁵ Hosie v. Gray, 71 Pa. St. 198.

²⁶ Glading v. Frick, 88 Pa. St. 460.

²⁷ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

²⁸ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

²⁹ Gill v. Weston, 110 Pa. St. 312; 1 Atl. Rep. 921.

³⁰ Railroad Co. v. Sanderson, 109 Pa. St. 583.

³¹ Hilton's Appeal, 116 Pa. St. 351; 9 Atl. Rep. 342.

pliances which are essential to the operation of a colliery, not, however, prop-timber.³²

§344. Mortgagor may remove gas, oil and minerals.

The mortgagor of gas, oil or mining lands may extract the oil or gas or remove the minerals, and convert them into money, if the gas or oil wells or mine operated were dug or opened at the time the mortgage was placed upon the premises; but if they were not, then the lands cannot be so worked, for it is waste as against the mortgagee to permit it, even though the land was purchased as mineral land.³³ To remove and convert into money minerals underlying the soil is not waste, unless it was necessary to penetrate the soil to secure such minerals.³⁴ The only restriction on the mortgagor is that he must not endanger or seriously impair the lien of the mortgage.³⁵ In one case, after decree of foreclosure and execution issued, the mortgagor quarried stone from a quarry, already open; and it was held that as between him and the mortgagee, the latter was entitled to the stone.³⁶

§345. Mortgagor in possession.

In this country the mortgagor is usually entitled to possession after default, and until a foreclosure of the mortgage and sale of the mortgaged premises, unless a receiver be appointed; and also until the year of redemption has expired, where a redemption is allowed. Where a statute provided that the mortgagor should be entitled to the possession of lands or tenements sold under execution, until the expiration of fifteen months from

³² Baker v. Atherton, 15 Pa. Co. Ct. Rep. 471.

³³ Ward v. Carp River Iron Co., 47 Mich. 65; 10 N. W. Rep. 109.

³⁴ Duff's Appeal, 21 W. N. C. 491; Capner v. Mining Co., 2 Greens. (N. J.) Ch. 467; Childs v. Hurd, 32 W. Va. 66; 9 S. E. Rep. 362; Vervalen v. Older, 4 Halst. (N. J.) Ch. 98; Leport v. Mining Co., 3 N. J. L. Jr. 280.

³⁵ Duff's Appeal, 21 W. N. C. 491; Ward v. Carp River Iron Co., 50 Mich. 522; 15 N. W. Rep. 889; Vervalen v. Older, 4 Halst. (N. J.) Ch. 98.

³⁶ American Trust Co. v. North Quarry Co., 31 N. J. Eq. 89. See Leport v. Mining Co., 3 N. J. L. Jr. 280.

the time of the sale, and use and enjoy the premises without being guilty of waste, in the same manner and for the like purposes, in which and for which they were used and applied prior to the sale, doing no permanent injury to the freehold, it was held the working of the open mines and the removal of ore from them was permitted by the statute; but not the opening of new mines.³⁷ "The judgment debtor was entitled to continue the working of a mine in a reasonable and prudent manner, having regard to the customary working before the sale, and to dispose of the proceeds. If the mining was improper, excessive or wasteful, it might at any time have been restrained, and the parties responsible for and held liable for the damages."³⁸ Where the mine underlies a farm, which has been mortgaged for the purchase money, any necessary and proper use of the farm in carrying on the mining operations is not a waste.³⁹ But if the operations proceed so far as to endanger the security, then the holder of it is entitled to an injunction restraining the further operation of the mine.⁴⁰

§346. Mortgagee in possession.

Where the mortgagee of a mining property goes into possession of the mortgaged premises, by reason of a default in payment, he has a right to work the mines that are open, but he is not bound to do so. He ought not to advance more money in a mining speculation than a prudent man would do; for if he does, and loses it, he cannot charge the loss up to the mortgagor.⁴¹

³⁷ *Ward v. Carp River Iron Co.*, 47 Mich. 65; 10 N. W. Rep. 109.

³⁸ *Ward v. Carp River Iron Co.*, 50 Mich. 522; 15 N. W. Rep. 889.

³⁹ *Capner v. Mining Co.*, 2 Gr. Ch. (N. J.) 467.

⁴⁰ *Appeal of Duff*, 21 W. N. C. (Pa.) 491. A stone quarry may be operated by the mortgagor. *Vervalen v. Older*, 4 Halst. Ch. 98.

See where an insolvent corporation, after decree in foreclosure and an execution issued against it, quarried stone on the premises and left

it thereon, it was held that the stone thus quarried was subject to the lien of the mortgage. *American Trust Co. v. Quarry Co.*, 31 N. J. Eq. 89. See *Leport v. Mining Co.*, 3 N. J. L. J. 280.

⁴¹ *Rowe v. Wood*, 1 J. and W. 555; *Elias v. Snowden Slate Co.*, 4 App. Cas. 455; 18 L. J. Ch. 811; 26 W. R. 869; 38 L. T. 871; *Hughes v. Williams*, 12 Ves. 493; *Thornycroft v. Crockett*, 16 Sim. 445; 2 H. L. Cas. 239; 12 Jur. 1081.

In such an instance the mortgagee is entitled to his expenses in necessary repairs of the mine, as "just allowances."⁴² If the security is insufficient to satisfy the mortgage, the mortgagee may open new mines on the mortgaged premises, and the court will allow him his costs in so doing.⁴³ If the opening of a new mine results in a loss, he must pay it; if in a profit, the mortgagor is entitled to a credit on his debt to the extent of the amount of the profit.⁴⁴ But if the security is sufficient, then the mortgagee in possession may not open a new mine.⁴⁵ If the mortgagor may not open a new mine, his mortgagee in possession may not. The mortgagee's right in the premises is measured by the rights of the mortgagor at the time the mortgage is executed.⁴⁶ In case of a default in the mortgage, the mortgagee, instead of taking possession, may apply for a receiver to operate the mine, for a colliery is a business.⁴⁷ But the mortgagor cannot secure the appointment of a receiver when the mortgagee is in possession, even though he alleges misconduct on the latter's part; for the mortgagor cannot in that way turn out the mortgagee so long as any of the debt remains unpaid.⁴⁸ If the mine be flooded by the careless conduct of the mortgagee in working it, he will be liable to make good the loss.⁴⁹ There ought to be inserted in every mortgage of a colliery, and this is also true of every mortgage on oil or gas lands, a clause enabling the mortgagee, in case he takes possession, or, where an agreement as to possession is not allowed, to apply for and have a receiver appointed to work the mine, if the mine

⁴² Tipton Green Colliery Co. v. Tipton Moat Co., 7 Ch. Div. 192; 47 L. J. Ch. 152; 26 W. R. 348. See Millett v. Davey, 31 Beav. 470; 32 L. J. Ch. 122; 7 L. T. 551; 11 W. R. 176; 9 Jur. (N. S.) 92.

⁴³ Hughes v. Williams, 12 Ves. 493.

⁴⁴ Millett v. Davey, *supra*.

⁴⁵ Thorneycroft v. Crockett, 16 Sim. 445; 2 H. L. Cas. 239; 12 Jur. 1081; Hood v. Easton, 2 Giff. 692; 2 Jur. (N. S.) 729; 27 L. T. (O. S.) 295; 4 W. R. 575.

⁴⁶ Elias v. Griffiths, 8 Ch. Div. 521; 46 L. J. Ch. 806; 26 W. R. 869; 38 L. T. 871; S. C. 4 App. Cas. 454; 48 L. J. Ch. 203.

⁴⁷ Jefferys v. Smith, 1 J. and W. 298; Gloucester Bank v. Rudry Colliery Co. [1895], 1 Ch. 629; Campbell v. Lloyd's Bank [1891], 1 Ch. 136, note; Peck v. Trinsmaran Co., 2 Ch. Div. 115; 24 W. R. 361.

⁴⁸ Rowe v. Wood, 1 J. and W. 555; 2 J. and W. 553.

⁴⁹ Taylor v. Mostyn, 33 Ch. Div. 226.

be a material portion of the security.⁵⁰ If the mortgage is of the interest of one co-tenant, the mortgagee is entitled to the same account as the co-tenant himself.⁵¹ If the mortgagee in possession of a colliery improperly work it, his mortgagor may obtain an injunction to prevent the wrong working of it, though not the proper working.⁵² As against a mortgagee in possession, a mortgagor is entitled to an accounting; and in such an action the mortgagee must account for not only all he has actually received, but for what he might have received but for his gross mismanagement or wilful neglect.⁵³

§347. **Mortgagee in possession, English rule.**

We take the following statement of the law in England with reference to mines, where the mortgagee is entitled to possession of the premises after default made, from Bainbridge on Mines:⁵⁴ "A mortgagee has in law an absolute estate in the lands mortgaged, and is entitled, after default in payment of the mortgage debt, to take immediate possession, and to receive the rents and profits of the mortgaged estate."⁵⁵ And as regards the mines and minerals within or under the lands comprised in the mortgage, he will be entitled to work any mines or quarries which have been already opened; but, of course, he is not bound to do so — at least, in the general case; and in no case ought he to advance more money in a mining speculation than a prudent owner would do. For, as Lord Eldon very justly observed, if he were owner he might speculate for himself as much as he pleased — *scil.*, because the advantages, whatever they might be, would be his, and if the speculation turned out unfortunate, he would bear the loss; but could a mortgagee be

⁵⁰ Norton v. Cooper, 5 De G. M. and G. 728; 25 L. J. Ch. 121; 23 L. T. (O. S.) 125; 2 W. R. 362.

⁵¹ Bentley v. Bates, 4 Y. and C. Exch. 182; 9 L. J. Exch. 30; 4 Jur. 552.

⁵² Taylor v. Mostyn, 23 Ch. Div. 583; 53 L. J. Ch. 89; Sheehy v. Muskerry, 1 H. L. Cas. 576; 7 Cl.

and F. 1; Taylor v. Mostyn, 25 Ch. Div. 48.

⁵³ Hughes v. Williams, 12 Ves. 493; Norton v. Cooper, 25 L. J. Ch. 121; 5 De G. M. and G. 728; 23 L. T. (O. S.) 125; 2 W. R. 362.

⁵⁴ Pp. 32-38 (5th ed.).

⁵⁵ Williams v. Medlicott (1819), 6 Price 496.

required to risk his own fortune in such a speculation, and to incur the hazards of an adventure the benefits of which would redound to the mortgagor? ⁵⁶ A mortgagee in possession being accountable for wilful default, it seems to follow, that if the property in mortgage be a mineral estate, the mortgagee will be bound to make the most reasonable use of the estate — *scil.*, because the nature of the estate should have been contemplated before he took possession; and at the same time, if he exceed the expenditure and risk demanded from a prudent owner, he will not be allowed such unnecessary or extravagant expenses, but will speculate at his own risk. Where a mortgage term of 500 years had been created in lands by the fee simple owner of the lands; and he subsequently opened a slate quarry in the lands, and worked such quarry (through certain lessees thereof who paid him a royalty of 1-18th the slate gotten); and afterwards the mortgagees entered — the court said, that they could (although only termors) continue the working of that slate quarry, although it had not been opened at the date of the creation of the term. And it appearing that the mortgagees had obtained an order absolute of foreclosure, they were held to have become termors absolute for the residue of the 500 years.⁵⁷ In *Hughes v. Williams*,⁵⁸ a mortgagee in possession had opened a slate quarry at an expense of 681.— and had made 21. out of the quarry — *i. e.*, he had sustained a loss of 661.; and the court left him to bear that loss, as he had speculated at his own peril. But in *Tipton Green Colliery Co. v. Tipton Moat Co.*,⁵⁹ where the defendants were unpaid vendors of a leasehold colliery, and they were in possession (in respect of their lien for the unpaid purchase money), and had expended divers sums of money upon the colliery (in necessary repairs and otherwise); and the plaintiffs (the purchasers) claimed to redeem them — the defendants were allowed (as a matter of course, *i. e.*, as

⁵⁶ *Rowe v. Wood* (1820), 1 J. and W. 315, 555.

⁵⁷ *Elias v. Snowdon Slate Co.* (1879), 4 App. Cas. 455; 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54.

⁵⁸ (1806) 12 Ves. 496; and see

Thornycroft v. Crockett (1848), 16 Sim. 445; 12 Jur. 1081; 2 H. L. Cas. 239.

⁵⁹ (1877) 7 Ch. D. 192; 47 L. J. Ch. 152; 26 W. R. 348.

“just allowances”) all their expenses on necessary repairs, but not anything for expenses beyond. In *Millett v. Davey*,⁶⁰ the plaintiffs were mortgagees in possession of the defendant's one equal undivided moiety of certain lands; and, in conjunction with the owner of the other undivided moiety, they made a lease of the mines, granting also certain surface rights; and under the lease, a large quantity of the minerals had been gotten, but at a loss — and a considerable part of the surface also had been damaged, in the exercise of the surface rights; and the lessees paid up all royalties accrued due, and abandoned the mine; and the plaintiffs obtained a judgment for foreclosure against the defendant — the security being proved to have been insufficient at the time the mortgagees entered — the court said, that they were not to be charged with the value of the coal (the defendant's moiety thereof) which had been gotten by the lessees, but only with the royalties (the defendant's moiety thereof) received by the plaintiffs, and not at all for the surface damage.

“In a mortgage of mines, there would usually be inserted special clauses enabling the mortgagees, in case they took possession (or become entitled to take possession), to appoint a receiver and manager, and to expend moneys on the working and development of the mines (including the opening of the new mines) — and in such a case, the mortgagees would be allowed their lawful expenditure with interest thereon.⁶¹ And the like clauses might be usefully inserted in every mortgage of lands containing mines, where the mines were a material portion of the security; and as regards keeping accounts of the mortgagees' workings, the clauses should provide for the mortgagor having inspection of the books of the colliery, but not (save at the expense of the mortgagor) for the mortgagees rendering him any account of the workings.⁶²”

“And, generally, as regards the opening of new mines, it appears the mortgagee may do so, if his security is insufficient;

⁶⁰ (1862) 31 Beav. 470; 32 L. J. G. M. and G. 728; 25 L. J. Ch. 121; Ch. 122; 7 L. T. 551; 11 W. R. 176; 23 L. T. (O. S.) 125; 2 W. R. 362. 9 Jur. (N. S.) 92.

⁶² *Ibid.*

⁶¹ *Norton v. Cooper* (1854), 5 De

and if in such a case he acts *bona fide*, the court will not restrain him.⁶³ But he opens the new mines at his own peril, that is to say — if the working results in a loss, and if the working results in a profit, the profit goes in towards the discharge of his mortgage debt.⁶⁴ But, *nota bene*, a mortgage of lands (in which are mines), if his mortgage is by demise only (*i. e.*, if he is entitled only to a term of years in the lands), may not open new mines — for a termor may not do so, unless he is without impeachment of waste. But just as any termor entitled absolutely may work the open mines, so may a termor who is a mortgagee,⁶⁵ at all events, if his security is insufficient. And if the mortgagor (or other person entitled under him subject to the mortgage term) should, during the continuance of the mortgage, lawfully open a new mine within or under the lands demised by the mortgage deed, the mortgage termor may thereafter work such newly opened mines — at least, if his security be insufficient. And all the like observations are applicable also to a new quarry — it being nevertheless understood that the quarry has been opened — that is to say, for the purpose of being worked as a commercial speculation, and not merely for the purpose of digging a few blocks of stone thereout for some specific private purpose.⁶⁶ But it rather appears, that if the security is not insufficient, the mortgagee has no right to open new mines, and that if he do open and work them, he will be charged with all receipts from the mines, without any allowance for the expenses in opening and working them.⁶⁷

“The mortgagee of a colliery, in lieu of taking possession of the colliery — whereby he incurs the liabilities above indicated

⁶³ Hughes v. Williams (1806), 12 Ves. 493.

⁶⁴ Millett v. Davey (1862), 31 Beav. 470, at p. 476; 32 L. J. Ch. 122; 7 L. T. 551; 11 W. R. 176; 9 Jur. (N. S.) 92.

⁶⁵ Elias v. Griffiths (1878), 8 Ch. D. 521; 46 L. J. Ch. 806; 48 L. J. Ch. 203; 26 W. R. 869; 38 L. T. 871; S. C. (sub nom.) Elias v. Snowdon Slate Co. [1879]. 4 App.

Cas. 454; 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54.

⁶⁶ Elias v. Griffiths (1878), 8 Ch. D. 521; S. C. (sub nom.) Elias v. Snowdon Slate Co. (1879), 4 App. Cas. 454.

⁶⁷ Thorneycroft v. Crockett (1848), 16 Sim. 445; 12 Jur. 1081; 2 H. L. Cas. 239; Hood v. Easton (1856), 2 Giff. 692; 2 Jur. (N. S.) 729, 917; 27 L. T. (O. S.) 295; 4 W. L. 575.

—ought to appoint a receiver (who will be the mortgagor's agent); and if a manager also should be necessary, he may obtain an order for the appointment of a receiver and manager; and he may obtain such an order even after he has entered into possession.⁶⁸ And the reason why the court appoints a receiver and manager is, because the security would otherwise go to ruin; and (where the colliery is a leasehold one) it might even be forfeited by the lessor — *scil.*, for neglect to work or for some other breach of the covenants in the lease;⁶⁹ and the mere fact that the colliery business is not specifically comprised in the mortgage will not make any difference, a colliery being a business.⁷⁰

“In *Rowe v. Wood*,⁷¹ the mortgagees were in possession, and the plaintiff (the mortgagor) was the party who applied for a receiver and manager of the mine — alleging misconduct on the part of the defendants in the management; but the court said, that the plaintiff could not (in that way) turn out the mortgagees from the possession so long as they alleged that they were unpaid (even a sixpence of) their mortgage debt; and all that the plaintiff (as mortgagor) was entitled to, was, to require the defendants to keep the proper accounts and to permit his inspection thereof.

“In *Norton v. Cooper*,⁷² the mortgage was of mines, with power for the mortgagees to enter and develop the mortgaged premises, and to expend money for that purpose; and the mortgagor, suing for redemption, claimed to charge the mortgagees with an occupation rent, and also to disallow them all their expenditure — both which claims the mortgagees, of course, resisted; and they also refused accounts, save at the expense of the mortgagor. The accounts as taken in the suit showed — 16,654*l.* owing on the mortgage for principal and interest;

⁶⁸ *Campbell v. Lloyd's Bank*, cited in [1891] 1 Ch. 136, note; *Peck v. Trinsmaran Co.*, 2 Ch. D. 115; 24 W. R. 361.

⁶⁹ *Gloucester Bank v. Rudry Colliery Co.* [1895], 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 2 *Manson* 223; 12 R. 183.

⁷⁰ *Jefferys v. Smith* (1820), 1 J. and W. 298; *Gloucester Bank v. Rudry Colliery Co.*, *supra*.

⁷¹ (1820) 1 J. and W. 315; (1822) 2 J. and W. 553.

⁷² (1854) 5 De G. M. and G. 728; 25 L. J. Ch. 121; 23 L. T. (O. S.) 125; 2 W. R. 362.

60,027*l.* owing as moneys properly expended in developing the mines; and 3,747*l.* owing as moneys properly paid in redeeming a previous mortgage; and 74,637*l.* received as profits from the mines — leaving 5,790*l.* still owing to the mortgagees; and the court allowed the whole expenditure, and also gave the mortgagees their costs of suit — holding that their conduct had not been vexatious, merely because they refused the accounts save on the mortgagor's first paying for the expense of the accounts; and the court refused, of course, to charge the mortgagees with any occupation rent.

“ In *Bentley v. Bates*,⁷³ where there were two lessees of a mine, and they were working it in quasi-partnership, and the plaintiff was the mortgagee of the interest of one of the lessee-partners, and claimed an account against the defendant who was the other lessee (the mortgagor being also a co-defendant) — the court said, that the plaintiff was entitled to all the rights of his mortgagor, and was therefore entitled to have an account of the profits (and generally of the management by the defendant) of the mine; and that he need not, for that purpose, ask for a dissolution of the partnership, as he would have been obliged to do in the case of an ordinary mercantile business — for a co-tenancy (or joint partnership) of lands is not to be determined by a partition of the lands, before an account can be taken on behalf of one of the co-tenants against the other or others of them.

“ In *Taylor v. Mostyn*⁷⁴ and *Mostyn v. Lancaster*,⁷⁵ certain lands containing coal mines (which in 1829 had been leased by the testator for a term which would expire in 1848) were devised to M. for his life, with remainder to M.'s first son in tail, and M. was empowered to lease the mines at his discretion: And M. (being in possession as tenant for life under the will) leased the mines in 1843 (for ninety-nine years) by way of mortgage to C. for securing a principal sum and interest, and with power

⁷³ (1840) 4 Y. and C. Exch. 182;
9 L. J. Exch. 30; 4 Jur. 552.

⁷⁵ 23 Ch. Div. 583; 51 L. J. Ch.
696; 46 L. T. 648; 48 L. T. 715; 31

⁷⁴ (1882) 23 Ch. D. 583; 53 L. J.
Ch. 89; 49 L. T. 483; 32 W. R.
256.

W. R. 3, 686.

of working the mines similar to those contained in the 1829 lease — which mortgage was afterwards (in 1850) transferred to X., to whom M. was already otherwise very largely indebted; and M. at the same time mortgaged also his life estate to X. (or to a nominee of X.); and (by a lease in 1850) M. demised the mines to X.'s nominee for forty years at a dead rent, and at royalties — and the last mentioned lease was duly confirmed by M.'s first son (who had in the meantime attained his age of twenty-one years, and had duly barred the tail): Afterwards, the life estate of M., and the fee simple remainder of his first son, became vested in Mostyn and others (the defendants in *Taylor v. Mostyn*, and who were also the plaintiffs in *Mostyn v. Lancaster*); and the 1850 lease was assigned to Taylor and others (the plaintiffs in *Taylor v. Mostyn*), and in them (or in the plaintiff Taylor alone as a nominee for them) were also vested the 1843 lease and the mortgage of the life estate. And the plaintiffs in *Taylor v. Mostyn* (by virtue of the lease of 1850) sublet the mines to the defendants in *Mostyn v. Lancaster*, and Taylor at the same time (and by virtue of the lease of 1843) leased the mines to the same defendants for a term limited to expire in 1900: And the action of *Taylor v. Mostyn* being for foreclosure, and the action of *Mostyn v. Lancaster* being for an injunction to restrain the removal of the pillars of coal in the demised mines — The court held — That the lease of 1843 was a valid exercise of the leasing power⁷⁶ — and consequently that the plaintiffs in *Taylor v. Mostyn* (unless they were redeemed) might foreclose; and That the lease of 1850 (or the sublease derived out of it) did not (upon its true construction) authorize the getting of the pillars, save with the consent of M. (which consent, so far as regards the past workings, had not been obtained), although (on the expiration of the 1850 lease, and during the then residue, if any, of the life of M.) the consent of M. to the working of the pillars of coal under the lease of 1843 had been (in effect) already given by M. — and, consequently, that the defendants must (save during such residue as aforesaid, if any of the life of M.) be restrained

⁷⁶ *Sheehy v. Muskerry* (1848), 1 Macl. and R. 493; Ll. and Gt. Plunk H. L. Cas. 576; 7 Cl. and F. 1; 568.

from removing the pillars of coal. And at a subsequent stage of litigation,⁷⁷ the plaintiffs in *Taylor v. Mostyn*, alleging that (owing to the decision in *Mostyn v. Lancaster*) their security was of vastly less value than the amount of their mortgage debt, neglected to prosecute their foreclosure decree; and, on the application of the defendants, the court directed them to do so, the order expressing that it was made at the express direction of the defendants — so that if the costs of the further prosecution of the decree should be found to have been (without any good purpose) forced on the plaintiffs, the defendants might be ordered personally to pay such costs; and the order gave the plaintiffs liberty to apply for a stay of all further proceedings. However, while the decree was being further prosecuted,⁷⁸ the defendants obtained from the court a declaration, that (as regards all the pillars of coal wrongfully removed by the mortgagee-lessees) the plaintiffs, as mortgagees, were to be charged with the full value of such coal, less only the cost of bringing it to bank (that is to say, allowing nothing for the cost of severing the coal); and it rather appearing that a flooding of the mines had been occasioned by the wrongful removal of such pillars, the court directed an inquiry as to that if (upon the result of that inquiry) the damage from the flooding should be traceable to the wrongful removal of the pillars of coal, the plaintiffs, as mortgagees, would be chargeable with that.”⁷⁹

ARTICLE 2.

GAS PLANT.

§348. Mortgage of gas plant.

§348. Mortgage of gas plant.

A franchise giving a right to “construct, own, maintain and operate” a gas or water plant may be mortgaged; and a mortgage on such a franchise of a plant in process of construction carries the plant with it.⁸⁰ It will also include tangible prop-

⁷⁷ (1883) 25 Ch. D. 48.

⁷⁸ 33 Ch. Div. 226.

⁷⁹ The expense of an unsuccessful effort in fishing for lost tubing has been allowed to a mortgagee

of an oil lease in possession. *Fuhr v. Buckeye Supply Co.*, 5 Ohio C. Pl. 187; 7 Ohio N. P. 420.

⁸⁰ *Andrew v. National Foundry*. 76 Fed. Rep. 166; 22 C. C. A. 110;

erty as an incident, if such was the evident intent of the mortgagor and mortgagee.⁸¹ Even though the company had no power to execute the mortgage, yet it cannot raise that question on the ground that it was of a quasi-public character, so long as the municipality in which it is situated does not challenge the validity of the mortgage.⁸² The property should be sold as an entirety without redemption; and no redemption can be allowed when the foreclosure is in the United States Circuit Court, notwithstanding a State statute requires mortgaged property to be sold subject to the right to redeem.⁸³

36 L. R. A. 139; 46 U. S. App. 281; 956; 20 C. C. A. 133; 36 U. S. App. rehearing denied, 77 Fed. Rep. 774; 563.

23 C. C. A. 454; 46 U. S. App. 619; ⁸³ Farmers' Loan, etc., Co. v. Iowa Water Co., 78 Fed. Rep. 881.

Hays v. Galion, etc., Co., 29 Ohio St. 330.

⁸¹ Andrew v. National Foundry, *supra*.
⁸² American W. W. Co. v. Farmers' Loan, etc., Co., 73 Fed. Rep. 608.

The purchaser is entitled to at once take possession as absolute owner. McKenzie v. Bismark Water Co., F. 6 N. D. 361; 71 N. W. Rep. 608.

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CHAPTER XVIII.

TRANSPORTATION AND EMINENT DOMAIN.

- §349. Scope of chapter.
- §350. Transportation of gas or oil a public use.
- §351. Carriers of oil.— Tank cars.
- §352. Transportation from State cannot be prevented.
- §353. Transportation by pipe line.— Inter-state commerce.
- §354. Regulation of transportation.
- §355. Ownership of oil in pipe lines.
- §356. May be endowed with powers of eminent domain.
- §357. Artificial gas companies.— Eminent domain.
- §358. Foreign companies excluded from use of power of eminent domain.
- §359. Number of lines that can be laid in right of way acquired.
- §360. Laying pipes in country highways.
- §361. Measure of damages for taking right of way.
- §362. Damages occasioned by gas company's trespass on land.
- §363. Prospective damages for fires and explosions.
- §364. Removal of pipe line, damages.
- §365. Pipe line crossing right of way of railroad company.
- §366. Revocation of license.
- §367. Route, specifying in petition.— More than one route.
- §368. Coal mine beneath pipe line.— Support.
- §369. Well pipe passing through coal mine.

§349. Scope of chapter.

In this chapter all questions of *negligence* in the transportation of oil or gas are eliminated, they finding an appropriate place in the chapters on Transportation and on Negligence, and in the one on Leaks and Explosions. So all discussions of the general principles and rules of practice of *eminent domain* are eliminated, except so far as they are peculiar to questions concerning gas and oil.

§350. Transportation of gas or oil a public use.

The transportation of natural gas or oil is a public use, as much so as a railway company engaged in the transportation of

articles of commerce. Indeed, natural gas and petroleum when brought to the surface and enclosed in tanks, reservoirs or pipes are articles of commerce, a commercial commodity. "The gas in the earth may not be a commercial commodity," said the Supreme Court of Indiana, "but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or a manufactured product is not an article of commerce, but, when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity." "Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be sold in the markets of the country."¹ There are many cases to the same effect; and it is now no longer an open question that the transportation of gas, whether artificial, manufactured, or natural, and oil, of whatever kind, is a public use.²

¹ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579.

² *Bloomfield, etc., Co. v. Richardson*, 63 Barb. 437; *Carother v. Philadelphia Co.*, 118 Pa. St. 468; 12 Atl. Rep. 314; *Johnston v. People's Natural Gas Co. (Pa.)*, 7 Atl. Rep. 167; *West Virginia, etc., Co. v. Volcanic Oil and Coal Co.*, 5 W. Va. 382; *Johnston's Appeal (Pa.)*, 7 Atl. Rep. 167; *In re Ohio Valley Gas Co.*, 6 Pa. Dist. Rep. 200; 27 Pittsb. Leg. J. (N. S.) 321;

West Virginia, etc., Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 545; 58 N. E. Rep. 706; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851.

Conducting natural gas from the wells to consumers is the transportation of freight. *Carother v. Philadelphia Co.*, 118 Pa. St. 468; 12 Atl. Rep. 314.

§351. Carriers of oil — tank cars.

Carriers of oil must serve all shippers impartially. If they fail to furnish tank cars for oil, in consequence of which the shipper is required to ship oil in barrels, they are liable for the damages resulting therefrom, under Sec. 8 of the Interstate Commerce Act providing that "any common carriers" subject to its provisions shall be liable for the "full amount" of all damages caused by violation of its provisions. If they charge for carrying oil in barrels when the use of tank cars for shipments has not been open impartially to shippers, in consequence of which such shippers have been deprived of the use of such cars, they will be required by the Interstate Commerce Commissions to refund the amount received for the transportation of the barrels.³

§352. Transportation from State cannot be prevented.

As gas and oil are instruments of commerce when confined in receptacles, a State cannot prevent their transportation beyond its boundaries, however desirable such prevention may be. This has been attempted without success.⁴ Because of its local character, however, it occupies a position distinct from other articles of commerce. "Upon this point," to quote from an Indiana case, "we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local character and peculiarities it is a proper subject of State legislation, and cannot, so far as regards local protection, be made the subject of general legislation by Congress; or, at all events, that it does not require a uniform system as between the States for its regulation."⁵

³ *Independent Refiners' Association v. Western, etc., R. R. Co.*, 4 Inter. St. Rep. 162.

⁴ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 6 L. R. A. 579; 29 Am. and Eng. Corp. Cas. 237; *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng.

Corp. Cas. 1; *Manufacturers' Gas, etc., Co. v. Indiana, etc., Co.*, 155 Ind. 545; 58 N. E. Rep. 706; *Manufacturers' Gas, etc., Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851.

⁵ *Jamieson v. Indiana, etc., Co.*, *supra*.

§353. Transportation by pipe line.— Interstate commerce.

There is no doubt about petroleum or natural gas (and even artificial gas) being the subject of commerce, even of interstate commerce. The Indiana Supreme Court has so considered it, saying:

“ Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. The gas in the earth may not be a commercial commodity, but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce, but, when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another, but property that may become an article of commerce cannot be kept in the State where it was produced by a State law forbidding its transportation. If this were not so, then, not only might coal and petroleum be kept within the State in which they were produced, but so might corn and wheat, cotton, and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result, and it was to prevent the possibility of such result that the provision vesting exclusive power in the Federal government was written in the National Constitution.”⁶

⁶ State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579; 2 Inter St. Com. Repts. 758; Manufacturers' Gas and Oil Co. v. Indiana, etc., Co., 156 Ind. 679; 60

§354. Regulation of transportation.

Notwithstanding that natural gas is the subject of interstate commerce, that will not prevent the State, in the exercise of its police power, taking such steps as will protect its inhabitants and their property, even though the effect is to prevent its general transportation. Such an instance occurs where the State prohibits a greater pressure in the pipes than a certain amount, although such a pressure is not sufficient to carry the gas from the field where it is found beyond the boundaries of the State. In an Indiana case the following language was used in discussing the right of the State to regulate the transportation of gas:

“If natural gas cannot be safely transported to a State distant from its source, it is because of its natural qualities, and not because of legislation. The restriction upon transportation, if there be any, is in the inherent nature of the thing itself; none is put upon it by the statute, since the statute does no more than regulate its conveyance from the wells to points of distribution in such a mode as to protect lives and property. This it does, and nothing more. If the distribution within the State cannot be made at safe pressure, it is because of the character of the local natural product, not because of any standard of pressure fixed by legislation. Fixing the standard of pressure is not a regulation of interstate commerce; possibly it might be different if the product were not a local one, and intrinsically dangerous; but natural gas is local and is dangerous in its transportation and use. It is the inherent element of danger that makes it necessary to handle, store, and transport natural gas in peculiar modes, and under reasonable restrictions. It is true that natural gas may be an article of commerce, but it is not an ordinary article of commerce. It is not a commercial commodity while in the earth, it is only so when it ceases to become real estate and becomes personal property. It cannot in any event become an ordinary article of

N. E. Rep. 1080; *Manufacturers' Gas and Oil Co. v. Indiana, etc., Co.*, 155 Ind. 566; 58 N. E. Rep. 851; *Manufacturers' Oil and Gas Co. v. Indiana, etc., Co.*, 155 Ind. 545; 58 N. E. Rep. 706.

merchandise in which no dangerous elements combine. In a limited and qualified sense it is a commercial commodity, but the limitation is not put upon it by any statute. That is done by nature. It is, no doubt, so far a commercial commodity that this State cannot prohibit its transportation to another State by direct legislation. If it can be taken from the well and transported to another State under a safe pressure the State cannot prohibit its transportation, nor can the State establish one standard of pressure for its own citizens and another standard for the citizens of other States. But nothing of the kind is attempted directly or indirectly, for, as we have shown, there is one standard and no prohibition. The standard is for all. If it is such as will allow the transportation of natural gas to other States, there is no restriction or burden upon interstate commerce. If there is a prohibition in any sense, or to any extent, it is in the nature of the commodity itself, but there is no prohibition. We have shown, as we believe, that natural gas, because of its local nature and intrinsic qualities, cannot be made the subject of general commerce between the States, and have thus established the conclusion that it cannot, so far as local safety is concerned, be made the subject of uniform Federal legislation, but is a legitimate subject for reasonable police regulation. But if it be conceded that it is the subject of general commerce between the States, it may, nevertheless, be the subject of legislation by the State in so far as the regulation is local. In every case in which there is an authoritative decision upon the question it is affirmed that the States may make police regulations, although articles of commerce may be affected by such regulations. Interstate commerce, it is true, can neither be burdened nor restricted. But the establishment of a reasonable police regulation for the local safety is neither a burden nor a restriction within the meaning of the law; since, if there be a lawful exercise of a governmental power, there can be no wrong. Our own cases recognize the power to enact reasonable police regulations concerning articles of commerce. But our decisions are of comparatively little importance upon this question, since the question is one to be determined by the decisions of the Supreme Court of the United States. The most familiar

instances of the exercise of police power over commercial commodities are those wherein intoxicating liquors were the subject of legislation, and it has been uniformly held that such commodities are subject to State authority.”⁷

§355. Ownership of oil in pipe lines.

Prima facie oil delivered to a pipe line belongs to the person to whose credit or in whose name it is delivered; and the pipe line company, when sued for the oil, cannot show that another owned it, or had an interest in it as a tenant in common.⁸ An interest represented by a run-ticket issued by a pipe line company storing and carrying oil may be garnisheed, although all the oil the company is intrusted with is mixed together and stored in a common stock in two States, in one of which the garnishee proceedings is brought, and although the particular oil for which the ticket was given was produced in the other State and was never in the State in which such proceedings are instituted.⁹

§356. May be endowed with powers of eminent domain.

Owing to the public character of transportation of oil and (natural) gas, companies producing or manufacturing such commodities may be endowed with the power of eminent domain, in order that they may secure a right of way for their pipe lines.¹⁰ “In this State the legislature, in the exercise of its discretion, has judged it proper to clothe companies, cor-

⁷ Jamieson v. Indiana, etc., Co., 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; Manufacturers' etc., Co. v. Indiana, etc., Co., 155 Ind. 566; 58 N. E. Rep. 851; Manufacturers', etc., Co. v. Indiana, etc., Co., 156 Ind. 679; 60 N. E. Rep. 1080; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446; 29 N. E. Rep. 1062.

⁸ Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. St. 421; 26 Pittsb. L. J. (N. S.) 314;

37 W. N. C. 473; 33 Atl. Rep. 687
⁹ Buckeye Pipe Line Co. v. Fee 15 Ohio C. C. 673.

¹⁰ Johnston v. People's Natural Gas Co. (Pa.), 7 Atl. Rep. 167; 5 Cent. Rep. 564; 15 Morr. Min. Rep. 556; Carother v. Philadelphia Co., 118 Pa. St. 468; 12 Atl. Rep. 314; Bloomfield, etc., Co. v. Richardson, 63 Barb. 437; West Virginia, etc., Co. v. Volcanic Oil and Coal Co., 5 W. Va. 382; *In re* New Rochelle Water Co., 46 Hun 525.

porations and associations engaged in the business of furnishing petroleum and natural gas to the citizens of this State, for consumption, with the power of eminent domain, while it has not, as yet, thought proper to clothe companies, corporations and associations not so engaged with that power. It is not our province to inquire into the motions which prompted the legislature to grant this power to persons engaged in furnishing petroleum and natural gas to the people of this State, and to make no such provisions for those furnishing them to the people of other States. It is sufficient for us to know that under the authorities they possess the power to do so, and that in the exercise of the discretion it possesses it has done so.”¹¹

§357. Artificial gas companies.— Eminent domain.

Companies for furnishing artificial or manufactured gas seldom possess the power of eminent domain; but there is no doubt that they may be endowed with that power.¹² They are

¹¹ Consumers' Gas Trust Co. v. Harless, 131 Ind. 446; 29 N. E. Rep. 1062; 15 L. R. A. 505; Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640.

A pipe line laid in ground without the land owner's permission belongs to the land owner. Windfall, etc., Co. v. Tutewiler, 152 Ind. 364; 53 N. E. Rep. 284.

Under a parol license to lay "water mains" the licensee has a right to lay only one main, where only one was contemplated when the license was given. Great Falls W. Co. v. Great Northern Ry. Co. (Mont.), 54 Pac. Rep. 963.

A statute providing that lands for gas pipe lines shall not be condemned within a certain distance of a dwelling, but permitting pipes to be laid along a highway, without regard to nearness of dwellings, has no application to the sinking of a well and laying pipes on one's own

land, between which and dwellings within that distance there is a highway. Windfall Manufg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 62 Am. St. Rep. 532; 37 L. R. A. 381.

Under a statute authorizing a natural gas company engaged in furnishing gas to the public, the petition for the condemnation of a tract for a right of way is fatally defective if it only alleges that the real estate sought to be condemned is necessary for its pipe line from its wells to a certain named city. It should show that it is engaged in furnishing gas to the public. If the statute authorizes merely taking an easement, then the petition is defective if it seeks to take the fee. Great Western, etc., Co. v. Hawkins (Ind. App.), 66 N. E. Rep. 765.

¹² State v. Indiana, etc., Co., 120 Ind. 575; 22 N. E. Rep. 778; 29 Am. and Eng. Corp. Cas. 237; 6 L. R. A. 579.

not usually such public corporations as are endowed with the privilege to exercise such a great power. Their property is not exempt from condemnation by a railway company seeking a right of way, as public quasi-public corporations usually are. In one case it was said: "There is nothing in the charter of the gaslight company which entitles it to exemption from the power of eminent domain exercised under the statute, in acquiring real estate. Its land is not held by virtue of any such right; nor is it required to serve any public use which confers upon it any special privilege in this respect. It is a private manufacturing corporation which furnishes gas to individuals and for the lighting of the public streets, on such terms as are agreed upon. This, of itself, does not make it a public corporation. It is not merely public because it has a public character. The land is not now, and has not been, devoted to gas purposes by the company, and it is not clear that it is not absolutely indispensable for their use at the present time. That it may become so hereafter does not necessarily deprive the petitioners of the right to acquire it if the public exigencies require it."¹³

§358. Foreign companies excluded from use of power of eminent domain.

The legislature may authorize domestic companies to exercise the power of eminent domain without extending the right to foreign companies; and the statute conferring such power is not for that reason unconstitutional.¹⁴ A foreign company may, however, be endowed with such power.¹⁵

¹³ New York, etc., R. R. Co. v. Metropolitan Gaslight Co., 63 N. Y. 326; 5 Hun 201. See also Commonwealth v. Lowell Gaslight Co., 12 Allen 77.

That an artificial gas company may be endowed with the right of eminent domain, see Bloomfield v. Richardson, 63 Barb. 437.

¹⁴ Consumers' Gas Trust Co. v. Harless, 131 Ind. 446; 29 N. E. Rep. 1062; 15 L. R. A. 505.

¹⁵ *In re* Ohio Valley Gas Co., 6 Pa. Dist. 200; 27 Pittsb. Leg. J. (N. S.) 321; United Waterworks Co. v. Omaha Water Co., 21 N. Y. Misc. 594; 48 N. Y. Supp. 817. See Cowell v. Colorado Springs, 100 U. S. 55; American, etc., Union v. Yount, 101 U. S. 352; Watts v. Gantt, 42 Neb. 869; 61 N. W. Rep. 104; Carlow v. Aultman, 28 Neb. 672; 44 N. W. Rep. 873.

§359. Number of lines that can be laid in right of way acquired.

A gas company having acquired a right of way by the power of eminent domain is not restricted in the size of the pipe it will lay down, nor in the number so long as it keeps upon such right of way.¹⁶

§360. Laying pipes in country highways.

As a pipe line is an additional burden on the fee of a country highway, a gas or oil company engaged in the transportation of gas or oil must condemn the fee for their use, and also obtain the consent of the proper public officials, before it can lay its pipe lines therein.¹⁷

§361. Measure of damages, for taking right of way.

The courts will presume that it is a damage to land to conduct a pipe line through it, without any evidence of that fact.¹⁸ In determining the amount of damages, both present and future damages may be recovered.¹⁹ The measure of damages in the appropriation of a right of way is the actual value of the land

¹⁶ *Dover Gaslight Co. v. Dover*, 7 De G. M. and G. 545; 4 Gas J. 129, 176; 1 Jur. (N. S.) 812.

A gas company cannot erect a telegraph or telephone line along and on its right of way on the ground that it is necessary to carry on the chief purpose of its incorporation. *Woods v. Greensboro, etc.*, Gas Co. (Pa.), 54 Atl. Rep. 470. See *Gray v. Boston Gaslight Co.*, 114 Mass. 149.

¹⁷ *Board v. Indianapolis, etc., Co.*, 134 Ind. 209; 33 N. E. Rep. 972; *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156; 42 N. E. Rep. 640; *Sterling's Appeal*, 111 Pa. St. 35; 2 Atl. Rep. 105; *Bloomfield, etc., Gas Co. v. Calkins*, 1 T. and C. (N. Y.) 549; *Calkins v. Bloomfield, etc., Gas Co.*, 1 T. and C. (N. Y.) 541.

In *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. Rep. 925, it is held that one owning the fee of a highway is not entitled to damages because of a water pipe laid therein.

In England, see *Selby v. Crystal, etc., Gas Co.*, 30 Beav. 606; 11 Gas J. 398; 6 L. T. R. 790; *Footway, Mitcham Gas Co. v. Wimbledon Local Board*, 30 Gas J. 600.

¹⁸ *Indiana Natural Gas and Oil Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487; 12 Nat. Corp. Rep. 60.

¹⁹ *Hyde Park, etc., Co. v. Porter*, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152. This statement, in its effect, must not be extended to prospective damages caused by negligence.

appropriated, and any injury to the residue.²⁰ In the case just cited only an easement was taken, and the court called attention to the difference where only an easement was taken and where the fee was condemned. "The object, therefore, of the legislature in passing the Act," said the court in the case cited, "we are now considering was to provide land owners a just and adequate compensation for damages incident to construction of pipe lines over and across their lands. Such compensation must be measured by the actual damages to the freehold occasioned by such construction, including the land appropriated and occupied, and the relation of the remaining land thereto."²¹ The amount to be allowed where the line is laid in the public highway is the difference in the market value of the land before and after the construction.²² Damages may be allowed for the inconvenience occasioned by the placing of boxes at a point where another line crosses, and which would not have been necessary but for the construction of such line.²³ But the right of the company to abandon the easement or right of way and remove its pipes cannot, it has been held, furnish a claim for injuries apprehended from its exercise; nor in reducing the amount by reason of the fact that the land owner would, by such abandonment, receive back his land without a burden imposed upon it.²⁴ But this case on appeal was reversed, as indicated below.²⁵

²⁰ *Manufacturers', etc., Co. v. Leslie*, 22 Ind. App. 677; 51 N. E. Rep. 510. The first opinion in this case, as reported in 49 N. E. Rep. 946, was set aside.

²¹ *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487; 12 Nat. Corp. Rep. 60; *Patterson v. People's Natural Gas Co.*, 172 Pa. St. 554; 26 Pittsb. L. J. (N. S.) 260; 37 W. N. C. 422; 33 Atl. Rep. 575; *Newberryport Water Co. v. Newberryport*, 168 Mass. 541; 47 N. E. Rep. 533. Benefits may be considered. *Fisher v. Baden Gas Co.*, 138 Pa. St. 301; 22 Atl. Rep. 29.

²² *Hankey v. Philadelphia Co.*, 5 Pa. Super. Ct. 148; 41 W. N. C. 27.

²³ *McMillan v. Philadelphia Co.*, 1 Pa. Super. Ct. 648; 38 W. N. C. 222.

²⁴ *Clements v. Philadelphia Co.*, 3 Pa. Super. Ct. 14; 39 W. N. C. 299; reversed 184 Pa. St. 28; 41 W. N. C. 321; 28 Pittsb. L. J. (N. S.) 344; 39 L. R. A. 532; 38 Atl. Rep. 1090.

²⁵ Evidence of the effect upon vegetation of escaping gas is admissible, even upon cross examination where the witness has testified that laying pipes through the soil would not injure the land. *Bloomfield, etc., Gas Co. v. Calkins*, 1 T. and C. (N. Y.) 549.

Damages for loss of rifle range.

§362. Damages occasioned by gas company's trespass on land.

Where a gas company commits a trespass upon land, under the claim or assertion of a right to lay a pipe line therein, the measure of damages is not the same as it is in proceedings to condemn a right of way. In such an instance the land owner is entitled to damages for any injury to the land caused by the operation of the pipe line. But he is not entitled, it has been held in Pennsylvania, for destruction of crops caused by escaping gas, if there be no evidence that the pipes are defective or not properly constructed.²⁶

§363. Prospective damages for fires and explosions.

Damages cannot be allowed for those that may possibly be occasioned by fires and explosions. The courts will not presume that gas or oil cannot be safely conducted through proper pipes; and it will not presume that the condemning company will not use proper pipes or conduct its business in a safe manner. Nor will it be presumed that gas or oil will be permitted to escape so as to injure growing crops or trees, or render the region through which it passes unsafe or undesirable to use for living purposes. It will not indulge the presumption that noisome smells will be permitted to escape, to the annoyance of the owner of the lands through which the pipe lines run.²⁷ This is especially true if a statute makes the company liable for damages thus occasioned in the future.²⁸

see *Holt v. Gaslight and Coke Co.*, L. R. 7 Q. B. Div. 728; 41 L. J. Q. B. 351; 27 L. T. (N. S.) 442. For injury to arches in street, *Gaslight and Coke Co. v. St. George Vestry*, 42 L. J. (N. S. Q. B.) 50.

²⁶ *Patterson v. People's Natural Gas Co.*, 172 Pa. St. 554; 33 Atl. Rep. 575; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41; 28 Atl. Rep. 1007; *Hankey v. Philadelphia Co.*, 5 Pa. Super. Ct. 148; 41 W. N. C. 27.

²⁷ *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55; 42 N. E. Rep. 487;

Manufacturers' Gas Co. v. Leslie, 22 Ind. App. 677; 51 N. E. Rep. 510; *Wolf v. Cincinnati, etc., Co.*, 6 Ohio Dec. 159; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41; 28 Atl. Rep. 1007.

²⁸ *Denniston v. Philadelphia Co.*, 1 Super. Ct. (Pa.) 599; 38 W. N. C. 332; 27 Pittsb. L. J. (N. S.) 14. Future prospective leaks in water pipes may be allowed. *Darlington v. Alleghany*, 28 Pittsb. L. J. (N. S.) 381; *McGregor v. Equitable Gas Co.*, 21 Atl. Rep. 13; 139 Pa. St. 230.

§364. Removal of pipe line, damages.

In a Pennsylvania case the following rule was laid down concerning damages occasioned by a removal of a pipe line:

“An entry for the purpose of removal stands, however, upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is, therefore, the duty of the company to make the removal at the time and in the manner best adapted to the purpose, and least harmful to the land owner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so far as to substantially to restore the surface of the land, and its failure to do so is just ground of a complaint. It should make compensation for any actual injury to growing grain or grass, and, if the field be in meadow, for any substantial injury to the turf, beyond the mere opening and filling of the trench in which the pipe lay. Subject, however, to the limitations now indicated, it has the right to enter and remove its pipe without being liable as a trespasser therefor.”²⁹

§365. Pipe line crossing right of way of railroad company.

The owner of an easement across or under a railroad track, for the purpose of passing and re-passing, cannot give a pipe line company the right to lay its line in his right of way; and if the pipe line company, acting upon a permission given by such owner of the easement, lay its pipe line in his right of way it will be liable to the railroad company in an action of trespass.³⁰ But where the owner of land conveyed a right of way to a railroad company for its railroad, and afterwards discovered gas

²⁹ *Clements v. Philadelphia Co.*, 184 Pa. St. 28; 28 Pittsb. L. J. (N. S.) 344; 41 W. N. C. 321; 38 Atl. Rep. 1090; 39 L. R. A. 532, reversing 3 Pa. Super. Ct. Rep. 14.

A gas pipe laid in the ground without permission of the land owner belongs to such land owner

and cannot be removed. *Windfall, etc., Co. v. Tutewiler*, 152 Ind. 364; 53 N. E. Rep. 284.

³⁰ *United States Pipe Line Co. v. Delaware, etc., Ry. Co.*, 62 N. J. L. 254; 41 Atl. Rep. 759; 42 L. R. A. 572; *Breckanidge v. Delaware, etc., R. R. Co.* (N. J.), 33 Atl. Rep. 800.

on his land beyond the railroad, it was held that he was entitled to a right of way across the company's track for a gas pipe, as a way of necessity.³¹

§366. Revocation of license.

A license to erect and maintain a reservoir and pipe line will not be revoked by court of equity, except on the condition that the licensee may remove his improvements, made on the faith of the license, if it can be accomplished without material loss, or if not, that the licensor or his grantor make a just compensation for the loss.*³¹

§367. Route, specifying in petition — more than one route.

The exact location of a purposed pipe line need not be given by courses and distances in the petition, under the ordinary statute; but it is sufficient to give the size of the pipe, the number of feet it will traverse the land in question, and its approximate direction.³² As a rule a company can have only one right of way across a tract of land; however convenient another would be.³³

§368. Coal mine beneath pipe line — support.

The easement of a gas company by eminent domain carries with it the right of support for its lines; and the owner of the coal has no right to remove the coal or other minerals under the lines to their injury or detriment. The right of the owner of the land is subordinate to the superior right of the gas company; and such superior right to the use of the ground appropriated extends to all the mineral underlying the line, including

³¹ Uhl v. Ohio River Ry. Co., 47 W. Va. 59; 34 S. E. Rep. 934.

*³¹ Flick v. Bell (Cal.), 42 Pac. Rep. 813.

³² *In re Ohio Valley Gas Co.*, 6 Pa. Dist. Rep. 200; 27 Pittsb. L. J. (N. S.) 321.

³³ McKay v. Pennsylvania Water Co., 6 Pa. Dist. Rep. 364; 27 Pittsb. Leg. J. (N. S.) 406.

If the company does not comply with the statutory requirements in securing a condemnation of a right of way, the courts will not enjoin the land owner from interfering with the laying of its pipe line. *Quarryville Water Co. v. Fritz*, 14 Lanc. L. Rev. 186.

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the coal, the removal of which would endanger the safety of the pipes. In such a case it may be shown in evidence in assessing the damages, the character of the soil through which the line will run, the depth the line will be below the surface of the ground, its proximity to the surface of the underlying coal, the danger of the surface falling in when the coal is removed, the probable breaking of the pipe line, and the danger of gas escaping into the mine, for the purpose of showing the general depreciation in the market value of the land through which the pipe line runs. The gas company has a right to the support of its pipe lines, and this is an element to be considered in estimating the extent to which the value of the tract as a whole is affected, though not to estimate the value of the coal supposed to be necessary to remain to afford a support. The fact that the gas company has executed a release of damages that might be occasioned by the removal of the coal does not prevent the owner of the mine recovering compensation for the risk of injuries to the mine in operating it.³⁴ Dangers to the coal mine that might be occasioned by gas escaping into the mine cannot be considered in assessing damages for a right of way; for the law provides a remedy in such a case by an action for damages; and if the mine owner has occasioned a break in the pipes, whereby the gas escapes into the mine, by removing their support, he cannot recover. If the gas company has released a right of support "from the coal or other mineral underlying the surface, then the owner of the coal may mine and remove it as freely and fully as though no entry had been made upon the surface, and for that reason it should not be taken into consideration in adjusting the damages to the land owners";³⁵ and the element of possible damages to the pipe line from a subsidence of the surface cannot be considered. Nor can evidence be admitted of a conjectural character as to the opinions of witnesses that there might be a subsidence where the coal is more than one hundred

³⁴ *Davis v. Jefferson Gas Co.*, 147 Pa. St. 130; 21 Atl. Rep. 13; 23 Atl. Rep. 218.

139 Pa. St. 230; 27 W. N. C. 197.

³⁵ *McGregor v. Equitable Gas Co.*,

feet below the surface, and therefore it would be necessary to leave coal for a support.³⁶

§369. Well pipe passing through coal mine.

A lessee of a coal mine, having only a right to remove the coal, and such rights as are incident thereto, cannot prevent the owner of the surface, or his lessee, drilling a gas well through the stratum of coal to the gas or oil below, whether or not the existence of the oil or gas was known at the time of the lease; and the lessee cannot prevent a use of either the surface or of the earth below the coal stratum. He is not entitled to damages because of the sinking of the shaft.³⁷ Nor will an injunction be granted where the pipes pass through that portion of the mine from which the coal has been removed, even though the charge is that there will be danger from explosions when such danger is denied by counter affidavits because of the extra precautions that are being used to prevent an explosion. Nor will a preliminary injunction be awarded to prevent the boring where the pipe passes through that portion of the mine excavated, if the remaining coal can be removed without serious interference by other passageways and the owner of the coal can be awarded a judgment for the value of the coal taken out on final hearing.³⁸ Nor will the fact that one or more wells have already been sunk prevent the sinking of other wells, unless positive danger should be occasioned thereby.³⁹

³⁶ *Wallace v. Jefferson Gas Co.*, Mellon, 152 Pa. St. 286; 25 Atl. 147 Pa. St. 205; 23 Atl. Rep. 416. Rep. 597; 18 L. R. A. 702.

On the same points see *Penn. Gas Coal Co. v. Versailles Fuel Gas Co.*, ³⁸ *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248.

131 Pa. St. 522; 19 Atl. Rep. 933. ³⁹ *Commonwealth v. Sauters*, 6

³⁷ *Chartiers Block Coal Co. v. Kulp* 407. See *Robbins v. Guffey*, 48 Leg. Int. 462.

CHAPTER XIX.

TRANSPORTATION OF OIL AND GAS.

- §370. Limit of discussion.
- §371. Injuries occasioned in transporting oil by reason of defective cars or track.
- §372. Defective oil tank.—Car.—Remote liability—Intervening agency.—Crude petroleum not a dangerous agency.
- §373. Oil shipped on trains carrying other goods.
- §374. Shipper's liability to servant of carrier. Naphtha.—Petroleum.—Dangerous agency.
- §375. Injury to passengers.—Train wreck.
- §376. Curiosity seekers.—Exploding oil.
- §377. Allowing oil to escape from pipe line.
- §378. Inspection of pipe line.
- §379. Oil illegally stored at railroad station.
- §380. Storing oil in warehouse.
- §381. Thief setting oil on fire.

§370. Limit of discussion.

In another chapter we have discussed the subject of Eminent Domain as applied to gas and oil pipe lines, and shall not here repeat what was there said; but shall only make use of the few cases there are on the subject of transportation of oil and gas, whether by the ordinary methods of transportation, or by railroad or water, or by pipe lines.

§371. Injuries occasioned in transporting oil by reason of defective cars or track.

A railway company or common carrier may be liable for injuries to property adjacent its right of way occasioned by the use of improper cars, or by allowing its track to become out of repair whereby a train is derailed, oil tanks it is carrying are bursted open, the oil set afire, the oil reaching adjacent property and setting it on fire. Thus where a railroad employe, charged with the duty of loading two tank cars with oil from an adjacent

reservoir, uncoupled the cars in order to move the one filled along the track to make room for the other one, when, by reason of a defective brake on it, it got away, ran down the track a mile, collided with a locomotive, burst the tank, set the oil on fire, which spread to property adjoining the right of way, which was burned down, the railroad company was held liable, for the reason that the brake was defective, and if a good one had been upon it the car would not have got away and there would have been no collision. It was considered that the railroad company's servant was in charge of both cars, and whatever he did was the act of the company.¹ So where an oil train was derailed by reason of a defective track, the tanks bursted, the oil set on fire, which spread to adjoining property, the railroad company was held liable, the court saying:

“The cases cited in the original opinion, as well as the authorities relied on by appellant, by reason and analogy, support the proposition that where a railroad company negligently and carelessly runs a heavy freight train, consisting, in part, of several cars of oil, over a defective and unsafe track, through a city, in the night, at a high and dangerous rate of speed, to wit: thirty-five miles an hour, in violation of an ordinance, it is guilty of a positive wrong, and not a mere passive negligence, and is liable for the loss sustained by the burning of the property of the adjacent land owner, occasioned through the wrecking of the train and the consequent flowing and burning of the oil, as the proximate and natural result of such negligence, under the circumstances alleged in the complaint. It was not necessary to aver in the complaint that after the wreck occurred, the company was then and there guilty of any other and additional act of negligence which caused the burning oil to run down hill onto appellee's land. Nothing could have been done after the wreck occurred to prevent such a result. The immediate flowing of the burning oil onto and over appellee's premises, and the consequent burning of her property, was, under the circumstances attending the disaster, inevitable. In other words, in conclusion on this subject, it will suffice to say that

¹Oil Creek, etc., R. R. Co. v. Keighron, 74 Pa. St. 316.

the wreck of the train, the ignition, explosion and burning of the oil, and the consequent destruction of appellee's property, are shown, by the averments in the complaint, to have been the natural and proximate result of the negligence of appellant."² But where there was a landslide which covered the track of a railway company, into which an oil train ran, was derailed, the oil tanks were broken open, the oil ignited from the fire in the locomotive and ran down a creek running alongside the track to the plaintiff's property, four hundred feet below, and set it on fire, the railroad company was held not liable; for the reason that it had not been guilty of any negligence, the landslide having occurred but a short time before the wreck, and it being impossible to stop the train between the place it could have been first seen by the engineer and the place where the train was derailed.

"To hold the defendant answerable for this loss," said the court, "would be on the same principle that the defendant would be answerable for all losses occasioned to other persons by reason of the burning oil floating down the current. If that burning oil, thus carried, directly fired bridges, wharves, warehouses and other property, over and along the stream for a great distance, every owner could recover his loss from the defendant, if it is liable to the plaintiffs. If the current of water is not an intervening agency, the cause is proximate; if it is, the cause is remote. The result depends not on time or distance, but on the presence or absence of an intervening agency. Whether the fire be carried by running water over which the defendant has no control, or through its own woodshed, or through the warehouse of another, can make no difference, unless it be held that water is not an intervening agency in carrying and communicating the fire."³ Where burning oil flowed down from neighboring property upon the defendant's pipe line, causing it to burst and throw a spray of burning oil on the plaintiff's house, thereby burning it down, the defendant was held not liable, for the pipe line was not the proximate cause of the injury. The

² *Lake Erie, etc., R. R. Co. v. Lowder*, 7 Ind. App. 537; 34 N. E. Rep. 447, 747. ³ *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293.

company was not bound to foresee and provide against the bursting of its pipe line.⁴

§372. Defective oil tank — car — remote liability — intervening agency. Crude petroleum not a dangerous agency.

We take the following statement of a case decided in the United States Court of Appeals, where a defective oil tank was practically the cause of a very destructive fire, but for which the shipping company was held not liable:⁵

“That in November, 1889, the Standard Oil Company shipped a tank car of crude petroleum containing 6,000 gallons from Lima, Ohio, to the Fort Scott Gas Co. of Fort Scott, Kansas. The tank car had a discharge pipe in the bottom and about the center of the tank some four inches in diameter and projecting about six inches below the bottom. The projection was threaded to receive a heavy cap screw. Within the tank the discharge pipe is fitted with a heavy valve to prevent the escape of oil. The valve rests upon a shoulder in the upper part of the discharge pipe. Below the shoulder there are four concaves made in the valve, to permit the flow of oil upon raising the valve. An inflexible iron rod is attached to the valve, extending through the dome on top of the tank and projecting a foot or more above it. Within the tank at the top there is a coiled wire spring arranged to hold the rod down and keep the rod in position, closing the outlet. To discharge the contents of the car through the lower discharge pipe the cap is unscrewed and the pipe coupling attached. The valve, by means of the rod, is then lifted and the oil permitted to flow through the outlet into the pipe and conducted to the reservoir provided for its reception. The tank car arrived at Fort Scott on the 17th day of November and was received by the consignee on the next day. The gas company caused the car to be removed from the yard of

⁴ *Behling v. Southwestern, etc., Pipe Lines*, 160 Pa. St. 359; 28 Atl. Rep. 777. The question of negligence in this case was held to be

one for the court and not for the jury.

⁵ *Goodlander Milling Co. v. Standard Oil Co.*, 63 Fed. Rep. 400; 24 U. S. App. 7; 27 L. R. A. 583.

the railroad company, where it was delivered and to be placed on the switch track of another company located on a street a half mile away between the property of the gas company and the steam flour mill of the plaintiff in error. This was done for the purpose of piping the petroleum contained in the tank into the reservoir of the gas company, located beyond the mill and upon the farther side of an intercepting street. The railroad track upon which the tank car stood was three feet distant from the furnace room of the mill, and the latter being three feet below the level of the railroad track at that point. The car was placed directly opposite the furnace room of the mill. On the afternoon of November the 18th before or at the time of the removal of the car on that day, it was observed by the engineer of the switch engine that the tank was leaking, the oil dripping at the outlet of the car and forming a pool on the ground. On the morning of the 19th of November two servants of the gas company undertook to discharge the oil into the reservoir of the gas company, through a pipe laid from the reservoir to the tank car. One of them adjusted the rod at the top of the car and reported to the other that it had been pushed down, indicating the valve to be in proper position. The other went under the car with a wrench to remove the cap and attach the pipe leading to the reservoir. He observed that the cap was loose and removed it with his hand; and it is stated in the brief of the counsel of the plaintiff in error — without reference to the record of verification of the statement — that the man observed as he went under the car for the purpose of removing the cap and attaching the coupling, that the oil was leaking some, but he did not deem that fact of moment, supposing that the valve was in proper position, and would prevent the discharge of petroleum until it was raised. Upon removing the cap, the oil flowed out before the coupling could be attached and despite the efforts made to prevent it and before the car could be removed from its position, the oil flowed down the descent, through an open window, into the boiler room and also upon some hot ashes, located at the rear of the engine room and boiler house, and some eight feet distant from the car and caught fire, whereby the mill and its contents were destroyed and property of the

value of \$107,000 consumed. After the fire and upon examination of the tank, it was discovered that it contained no valve; that it was removed, but how, or when, it is not disclosed by the evidence, but presumably before the tank car was filled with oil for shipment. The evidence established that crude petroleum will give off a vapor or gas which will flash at a temperature of 90 degrees, igniting by contact with fire, and explosive upon its ignition; that it is in common use for fuel purposes; that it is as volatile as turpentine. The action against the Standard Oil Company by the mill owner is predicted upon negligence in omitting to have a proper valve in the outlet of the tank. At the trial of the cause and upon a conclusion of the evidence for the plaintiff, the court directed the jury to find a verdict for the defendant." In passing upon the liability of the Standard Oil Company, the court used the following language:

"We are thus brought to the question whether crude petroleum may properly be classified as a 'dangerous agency within' the meaning of the rule. It is an extensive article of commerce, transported by rail to all parts of the land, shipped by steamers and sail vessels to all parts of the world. It is innocuous of itself. It is dangerous only when in considerable quantity it is brought in contact with fire. It is in general use for fuel and other purposes. It is no more volatile than turpentine, no more explosive than gas; does not necessarily, in handling, involve immediate danger to any one. It is not a dangerous agency in itself, but becomes such by subjection to a high degree of heat or from actual contact with fire. The shipment of such an article of commerce casts upon the shipper a certain duty to the public — that of providing a suitable vehicle for the petroleum in all respects adapted to the purpose of carriage and able to encounter the usual risks of transportation reasonably to be anticipated. We think that to be the true limit of the shipper's duty, and that duty as it appears to us in this case was properly discharged. The petroleum was contained in a tank impervious to fire. The shipment reached its destination in safety. The case is not like that of the shipment of explosives, the character of the shipment being concealed. Here the contents of the tank was declared by the peculiar construction of the car. The prop-

erties of the petroleum were known to the consignee and to the public equally with the defendant. They are matters of common knowledge. There was here no disguise and no concealment.

“With the knowledge (of the oil leaking) the company placed the car within three feet of the engine and boilers of the mill, located below the grade of the railroad, and with knowledge of the leakage, sufficient, in view of the dangerous proximity of fire, to the place, a careful person, upon diligent inquiry, undertook to discharge the oil in close proximity to hot ashes, and near an open window of the boiler room. We cannot say that the negligent omission of the valve ‘necessarily set the other causes in operation,’ nor can we say that the injury was the natural and probable consequence of the negligent act. In marshalling the probable consequences, which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and abnormal that this injury should result. We are of the opinion that the intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered effective to an injury that was not the probable and natural consequence of the act.”

§373. Oil shipped on trains carrying other goods.

If a railroad company ships oil on a train carrying other goods and merchandise, it must take every available precaution against the communication and spread of fire, if it should occur.⁶ It must exercise the same degree of care in handling and transporting combustible oils as is exercised by merchants and insurers in dealing with such articles.⁷

§374. Shippers liability to servant of carrier.—Naphtha—petroleum — dangerous agency.

A shipper of naphtha should be careful to so mark the barrels or casks in which it is shipped that it can be readily ascer-

⁶ Empire Transportation Co. v. Wamatta, etc., Co., 63 Pa. St. 14. ⁷ Henry v. Cleveland, etc., R. R. Co., 67 Fed. Rep. 426.

tained what is in such barrels or casks, and thus put the servants of the carriers on their guard, so that they will be able to avoid danger in coming in contact with the oil. Thus where naphtha was put in leaking barrels having white heads, across which was written the words "Unsafe for illuminating purposes," and the naphtha was billed, with other barrels of petroleum, as carbon oil, and an explosion was caused by a servant of the carrier bringing a light too close to the leaking barrels, it was held that the shipper was liable, the words on the barrel heads and in the bill of lading not being enough to apprise those handling the oil of its dangerous character. In this case it was insisted that the servant was guilty of contributory negligence in going into the car with a light; but it was held that the plaintiff could show that he supposed the car was loaded with ordinary oil and prove by a witness that there was no danger in going into a car loaded with such oil, with a light. It was also held that the shippers might show that wooden barrels were safe, and that naphtha was ordinarily shipped in that way by prudent business men; and that it was no defense that the carrier's officers had agreed that the naphtha might be shipped in the manner in which it was put up.⁸ Petroleum, however, is not a dangerous agency within the rule that he who uses it does so at his peril and must respond to injuries thereby occasioned, not caused by external natural consequences or by the interposition of strangers.⁹

§375. Injury to passengers.— Train wreck.

A freight train carrying two tank cars of naphtha, one of kerosene oil, a car of coke and a caboose, was wrecked, blocking the right of way, and the cars became afire. On the arrival of a passenger train, those in charge of it began transporting the passengers around the wreck to another train on the other side. A gap was opened in the fence along the right of way so that

⁸ Standard Oil Co. v. Tierney, 92 Ky. 367; 17 S. W. Rep. 1025; 14 L. R. A. 677; 13 Ky. L. Rep. 626; Standard Oil Co. v. Tierney, 95 Ky. 633; 96 Ky. 89; 27 S. W. Rep. 983.

See Barney v. Burstenbinder, 7 Lans. 210.

⁹ Cleveland, etc., Ry. Co. v. Ballentine, 84 Fed. Rep. 935; 56 U. S. Apps. 266; 28 C. C. A. 572.

the passengers could be transferred around the fire a safe distance from it, and were transferred in safety to a place beyond the wreck where they were free from danger. The plaintiff, following the direction of the company's officers, passed through the gap, around the fire and burning oil and re-entered through a second gap upon the right of way by passing through the gap in the fence made by such officers so he could reach the place where he was to take the train. After going through this last gap he went back along the railroad track, on the right of way, toward the wreck, although the oil was burning fiercely with a loud noise, and arriving at a point about two-thirds of the distance between the second gap and the wreck, he stood there half an hour watching the fire, when the naphtha and oil exploded, and he was badly burned. When the explosion occurred, the train to carry the passengers had not yet arrived; and the evidence of the company tended to show that its agent had indicated a place where the passengers were to remain until the train that was to carry them had arrived, and that such place was a safe one, and if he had remained there he would not have been injured. It was held that the dangers were so apparent that plaintiff should have avoided the danger; that the railroad company had the right to assume that he would occupy the place to which he had been conducted and would not expose himself to danger; that it was not bound to restrain him from going near the wreck, that he, at the time of the injury was still a passenger, having a right to complete his journey on the company's cars, and the taking up of the dangerous position near the burning tank might bar him from a right to recover damages for his injuries, but it did not affect his rights as a passenger; that as the company did nothing to invite him to the place of danger, he had to exercise ordinary care for his own safety; that the company was bound to exercise only ordinary care and prudence, and that the question of negligence on the plaintiff's part, as well as on the defendant's, were questions for the jury to determine under proper instructions. A new trial was granted.¹⁰

¹⁰ Conroy v. Chicago, etc., Co., 96 Wis. 243; 70 N. W. Rep. 486; 38 L. R. A. 419.

§376. Curiosity seekers.— Exploding oil.

A train of cars was run into oil cars standing on a side track, by reason of a switch having been negligently open, some of the tanks burst, and the oil took fire. At the time the plaintiff was two miles away. He went to the scene of the disaster, on arriving there found the fire burning fiercely, the oil being on fire and making a loud noise like steam escaping from an engine. He went upon the premises of his own free will. The oil ran along the track and set fire to oil tanks that had not been bursted by the collision, and which burst and injured him. Two hours elapsed after the wreck and before the explosion, and the company could have removed the unburst tanks to a place of safety and extinguished the fire. The plaintiff claimed no warning had been given of the danger of exploding tanks; that at the time he was in the exercise of due care for his own safety, and that he was assisting in putting out the fire at the request of one of the servants of the railroad company. The court held that petroleum only became a dangerous agency when heated; that the plaintiff was not a trespasser, but was engaged in a laudable work; that the company was guilty of negligence in leaving the switch open whereby the collision was occasioned, and also in not stopping the fire or removing the cars to a place of safety so the fire could not reach them, and in not giving a sufficient warning to the injured person, and that if the plaintiff exercised due care and caution he was entitled to recover.¹¹ A companion of the plaintiff was injured, under the same circumstances and conditions, by the same explosion; and his case being appealed he was denied a recovery. The ground of the denial was that "negligence to be actionable, must occur in a breach of a legal duty arising out of a contract or otherwise, or owing to the person sustaining the loss"; and the court defined a "legal duty to be" that which the law requires to be done or forborne to a determinate person, or to the public at large, and as a correlative to a right vested in such persons, or public at large"; that the plaintiff was only a licensee, having no greater rights than

¹¹ Henry v. Cleveland, etc., Ry., 67 Fed. Rep. 426.

a city fireman called to extinguish a fire and entering a burning house; that the negligent act in leaving the switch open was a breach of no duty to the plaintiff, who was two miles distant at the time, and who voluntarily came to the scene; and that the fact he was assisting the servants of the company to put out the fire could not aid him, for the danger was obvious.¹²

§377. Allowing oil to escape from pipe line.

A pipe line company is bound to safely keep the oil it is transporting in its pipes, and not allow it to escape; and if it does escape, to the damage of another (such as spoiling his well or springs or crops), it is liable in damages for the injury. Such an act is the creation of a nuisance.¹³

§378. Inspection of pipe line.

It is the duty of a pipe line company to keep a careful watch over its lines, to detect leaks and imperfections in them and prevent oil escaping. If it do not, its failure to do so may be such negligence on its part as will render it liable. Thus where a contractor putting in a sewer for a city, uncovered a section of an oil pipe line that was empty, and in blasting rock broke it apart at one of its joints, from which two weeks later oil escaped by reason of pumping having been resumed, causing personal injuries resulting in death, the company was held liable on the ground that it had failed to inspect the line for two weeks, at the end of which time the pumping of oil was resumed and continued for a period of two and a half hours when it was notified by the employees at the other end of the line that no oil was flowing.¹⁴

¹² *Cleveland, etc., Ry. Co. v. Bahlentine*, 28 C. C. A. 572; 56 U. S. App. 266; 84 Fed. Rep. 935. As to the right of a city fireman injured in a building while extinguishing a fire, see *Gibson v. Leonard*, 143 Ill. 182; 32 N. E. Rep. 182, affirming 37 Ill. App. 344; *Woodruff v. Bowen*, 136 Ind. 431; 34 N. E. Rep. 1113.

¹³ *Hauk v. Tidewater Pipe Line Co.*, 153 Pa. St. 366; 26 Atl. Rep. 644. See *Clements v. Philadelphia Co.*, 184 Pa. St. 28; 41 W. N. C. 321; 38 Atl. Rep. 1090; 39 L. R. A. 532. See *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426.

¹⁴ *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426. The question of negligence was held to be a proper one for the jury.

§379. Oil illegally stored at railroad station.

Oil was stored or permitted to remain at a railroad station in violation of a statute, or rather it had been kept there longer than the statute permitted it to be kept. There were thirty barrels, some full, some partly full and some empty. The platform on which these barrels were standing was about four feet above the ground, old and rotten, had rubbish beneath it, and was soaked with oil. A teamster, not connected with the railroad company, but having a right to go upon the premises, while upon this platform, lighted his pipe with a match and threw down the burning match on the oil soaked boards, from which a fire was started. The fire spread to and burned the property of others. The court, assuming that the company had violated the statute by keeping the oil on the platform longer than the statute allowed it to do so, held that the proximate cause of the injury was the act of the teamster and refused to consider anything back of that act, on the ground that the company could not anticipate that a responsible person would throw a lighted match in the place he did and start a fire. The court also declined to hold that the negligence of the company was concurrent with that of the teamster, for the reason that the negligence of the former preceded that of the latter and was an existing fact when his negligence intervened; and directed a verdict for the defendant.¹⁵

§380. Storing oil in warehouse.

Oil of a highly inflammable kind, awaiting shipment, had been stored for two days in a warehouse before the warehouse was set on fire. The warehouse was set on fire without the neglect of the owner; and the fire from it spread to an adjoining warehouse and destroyed it with the greater part of its contents. The owner of the second warehouse sued the owner of the first, claiming that because of the explosion of the oil

¹⁵ *Stone v. Boston, etc., Ry.*, 171 Mass. 536; 51 N. E. Rep. 1; 41 L. R. A. 794.

the fire from the first warehouse was suddenly precipitated upon his warehouse, and that if it had not been for the exploding oil, a greater portion of the contents of his warehouse would have been removed before the fire, which was burning in the warehouse at the time of the explosion, could have extended to his building. The court held that the questions of proximate cause and whether the oil had been in the warehouse for an unreasonable length of time were for the jury, and that the plaintiff might show that the warehouse and its floor were soaked with oil.¹⁶

§381. Thief setting oil on fire.

Crude petroleum was carried in a tank on a lighter used in the oil trade. The lighter, with others, lay at a pier, with no watchman on board. It was forced open by a thief, who, in exploring the locker with a lighted match, set fire to the gas or fumes arising from the petroleum, thereby causing an explosion and a fire. The fire destroyed the lighter and another one lying alongside of it. Suit was brought against the owner of the lighter on which the explosion occurred to hold him liable for the destruction of the other lighter; but the court held that he was not liable, for the escape of the gas into the locker was an accident, and the presence of a lighted match in the locker in the hands of a thief was not the natural result of the absence of a watchman.¹⁷

¹⁶ *Wright v. Chicago, etc., Ry. Co.*, 27 Ill. App. 200.

¹⁷ *Sofled v. Sommers*, 9 Ben. 526; Fed. Cas. No. 13, 157.

CHAPTER XX.

LEGISLATIVE AND MUNICIPAL CONTROL.

- §382. Gas a dangerous agency.— Police powers.
- §383. Regulating pressure in pipes.
- §384. Prohibiting transportation of gas beyond the State.
- §385. Plugging abandoned wells.— Waste of gas.
- §386. Preventing waste of gas.— Flambeau lights.
- §387. Waste of gas in operating oil well.
- §388. Inspection of oil.— Tests.
- §389. Ordinance regulating storage of oil.
- §390. Regulating sale of naphtha by United States.
- §391. A charter is a contract.
- §392. City cannot fix rates without statutory authority.
- §393. Municipality regulating rates after ordinances granted.
- §394. Rates fixed in ordinance granting franchise.
- §395. Rates fixed by city in its consent to assignment of franchise right.
- §396. Gas company accepting provisions of subsequent ordinance.
- §397. Prohibition to change for specified time.
- §398. Police power.— Rates.
- §399. Municipality regulating gas companies.
- §400. Power to change rates.— Rates established must be reasonable.
- §401. Gas companies *quasi* public corporations.— Rates may be changed.
- §402. Same continued.— Rates may be changed.
- §403. Same continued.— Rates may be changed.
- §404. Municipality delegating power to change rates.
- §405. Annexing territory after contract made.
- §406. Police power regulations.

§382. Gas a dangerous agency — police powers.

Gas, and especially natural gas, has always been regarded as a dangerous agency, and must be used with care whenever it comes in contact with property or persons. That it is a dangerous agency is a matter of common knowledge, of which the courts will take judicial notice.¹ It is in a high degree inflammable and explosive. Not only is it dangerous as an explosive, but it is dangerous to life and injurious to herbage, shrubbery

¹ Sec. 41.

and growing trees under certain circumstances. It is in fact as dangerous an agency as gunpowder, which has always been regarded as a proper subject of legislation, even to the extent of excluding it from thickly settled communities. Therefore, under the police powers of a State, it is a proper subject of regulation. "The public safety and welfare," said the Supreme Court of Indiana, "is the highest consideration in all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one man to so use property as to endanger the property of others, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such dangerous nature as to require regulations to prevent injury to others can have no right paramount to the police power. It is not too much to say that against the police power there is no such thing as a vested right. If the position of the appellee's counsel is tenable, then after a corporation has invested money in natural gas pipes, machinery and appliances, there can be no subsequent legislation, although the use of the pipes bought might put in peril towns, houses, and even human life along the entire line. The law is subject to no such reproach as a rule like that for which appellees contend would bring upon it. No investment, however great, can so vest a right as to preclude the just exercise of a governmental power such as that under which regulations for the protection of the health and safety of persons are enacted. This principle is supported by many decisions."²

§383. Regulating pressure in pipes.

In the exercise of its police power for the protection of life and property, a State may regulate and prescribe the pressure in the gas mains of a company; and it may fix a limit for such

² Jamieson v. Indiana Natural Gas, etc., Co., 128 Ind. 555; 28 N. E. Rep. 76; 34 Amer. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Interstate Com. Rep. 613; Benedict v. Columbus, etc., Co., 49 N. J. Eq. 23; 23 Atl. Rep. 485; Given v. State (Ind.), 66 N. E. Rep. 750.

pressure even though it has the effect to prevent the conveyance or transportation of gas, as natural gas, beyond the limits of the State, a thing of itself a State cannot prevent. "The pipes for the transportation of the gas," said the Supreme Court of Indiana, "must be laid in our soil; they must cross our farms, pass through our towns, and cross our highways. There are many persons, many houses, and much property along the line, within the borders of this State. There is danger to our inhabitants, and to their property from the use of defective or insecure pipes, as well as from an improper use of them. If a volatile, inflammable, and explosive substance, such as natural gas, can not be conveyed in pipes, under an unsafe pressure, without danger to those whom it is the duty of the commonwealth to protect, then regulation is not unreasonable or illegal in itself. The danger is to our citizens in their own houses, and on their own thoroughfares. It cannot, we suppose, be successfully asserted that a gas company could use pipes of paper, or of spider-webs, at their pleasure; and yet, if there is no power in the State to regulate the character of the pipes, or the like, this conclusion must result. They, indeed, may do what they please. The danger to be avoided is within the State; the protection of the law ought, upon every principle of justice, to be commensurate with the danger. The legislation is local, is for local protection, and for, presumptively, at least, no other purpose. Gas companies acquire the right to lay pipes by virtue of the power of eminent domain resident in the State, and surely if they take the benefit of our laws, and use our lands and minerals, they must yield obedience to such laws as are framed for the local protection. . . . It seems true beyond fair controversy that the State, by virtue of its inherent power, may provide that pipes shall be laid in trenches, or shall be of sufficient strength to be safe. Otherwise they might be laid on the ground subject to the action of the elements, or be of inadequate strength and thus be fruitful of danger to persons and property. It also seems entirely clear that the State may declare that gas shall not be confined in insufficient tanks or reservoirs, as was done respecting petroleum in States where it is obtained. If

it be true that such regulations may be made it must also be true that pressure may be regulated, and that the State must, to a great extent, be judge of the nature and character of the regulations required. The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil, or rocks of the earth. It is as strikingly local as coal or petroleum, and yet no one has ever questioned the power of a State to enact laws governing mining. If it be not true that the mining and conveyance of natural gas may be regulated for the protection of persons and property, it may be true that many mining laws are void. Coal oil is subject to inspection and regulation, and so must be natural gas, for it is more dangerous than coal oil. It is so essentially local that only local regulations can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world." It was held in pursuance of this line of reasoning, that a statute providing that gas pipes for transporting of natural gas should be tested to at least four hundred pounds pressure to the square inch, and gas "should not be transported in such pipes at a pressure exceeding three hundred pounds per square inch, or otherwise than by the natural pressure of the gas flowing from the wells," was valid; although the effect of this regulation was such that gas could not be transported beyond the State line where the distance it was desired to transport it was a long one.³

³ Jamieson v. Indiana, etc., Co., 128 Ind. 555; 28 N. E. Rep. 76; 34 Am. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Inter. Com. Rep. 613; Benedict v. Construction, etc., Co., 49 N. J. Eq. 23; 23 Atl. Rep. 485; Manufacturers' Gas and Oil Co. v. Indiana, etc., Co., 155 Ind. 566; 58 N. E. Rep. 851; Manufacturers' Gas and Oil Co. v. Indiana, etc., Co., 156

Ind. 679; 59 N. E. Rep. 169. In this last case it was held that an individual cannot maintain an injunction to prevent an unlawful transportation of gas, unless he suffers an injury peculiar to himself. See also Richmond Natural Gas Co. v. Enterprise Natural Gas Co. (Ind. App.), 66 N. E. Rep. 782.

§384. Prohibiting transportation of gas beyond the State.

Natural gas is an article of commerce, although not an ordinary article of commerce. While in the earth it is not a commercial commodity; it becomes so only when it ceases to be a part of the real estate and becomes personal property. So far as it is a commercial commodity the State cannot prohibit its transportation to another State by direct legislation; and a statute enacted for that purpose is void, on the ground that it is an infringement of that clause of the Federal Constitution giving Congress the right to regulate commerce between the States.⁴ But this does not prevent a reasonable regulation of the pressure in the pipes, although the effect of such regulation is to prevent the transportation of gas a long distance, and to a very great extent confine its use to the limits of the State.⁵

§385. Plugging abandoned wells — waste of gas.

A penal statute which requires all wells to be so used as to prevent the escape of gas or oil into the open air, without being confined in pipes "or other safe receptacles for a longer period than two days next after" it has been struck in such wells; requiring all abandoned wells to be plugged in a certain manner; and providing that if the owner does not plug them within the two days' limit any owner of lands adjacent to them or in the vicinity may enter and plug them and recover the cost of plugging from their owner, is a valid exercise of the public power; and the State may, in its sovereign capacity, maintain a suit to enjoin waste in violation of such statutes, on the ground that such waste is a nuisance. The court said, in passing on such a statute, that natural gas in the ground was no more the property of the owner, so long as it remained there, than the air or sunshine that floated over such ground; and therefore

⁴ *State v. Indiana, etc., Co.*, 120 Ind. 575; 22 N. E. Rep. 778; 29 Amer. and Eng. Corp. Cas. 237; 6 L. R. A. 579; 2 Inter. Com. Rep. 758.

128 Ind. 555; 28 N. E. Rep. 76; 34 Am. and Eng. Corp. Cas. 1; 12 L. R. A. 652; 3 Inter. Com. Rep. 613; *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23; 23 Atl. Rep. 485.

⁵ *Jamieson v. Indiana, etc., Co.*, 485.

the claim made that such a statute prohibited the owner of the gas to do with it as he pleased was not well taken. "It is not the use of unlimited quantities of gas," said the court, "that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that administers more to the comfort, happiness, and well being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana. . . . We had petroleum oil more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessing of natural gas unless measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant [the

State] has a right to have abated by injunction.”⁶ On appeal this case was affirmed by the Supreme Court of the United States.⁷

§386. Preventing waste of gas — flambeau lights.

The State by statute may prevent the waste of natural gas; and as the burning of gas in flambeau lights, whether in the country or in the city, is a very wasteful method of securing light, it may prohibit its use in that manner, allowing its use in “jumbo” burners enclosed in glass globes or in other ways that are not wasteful. Such a statute does not deprive an individual of his property without due process of law or without just compensation, nor “grant to any citizen, or class of citizens, privileges or immunities which upon the same terms” do “not equally belong to all citizens.” “The act,” said the

⁶ *State v. Ohio Oil Company*, 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; *Given v. State (Ind.)*, 66 N. E. Rep. 750.

⁷ *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 576.

Such a statute must be strictly construed. Under the Ohio statute it must appear in the petition to recover the penalty given by the statute that the complainant is a resident of the county where the suit is brought; but such defect must be taken advantage of by special demurrer particularizing such defect. Some act must be shown indicating the defendant's intention to abandon the well. As long as the casing remains in the well and prevents water from penetrating the oil-bearing rock, the penalty is not incurred; but it is not necessary to aver that the casing has been drawn. *State v. Oak Harbor Gas Co.*, 18 Ohio Cir. Ct. Rep. 751; 4 Ohio Cir. Ct. Dec. 158; affirmed 53 Ohio St. 347; 41 N. E. Rep. 584.

Under a statute declaring it unlawful for any person to turn off any valve belonging to any person furnishing gas to consumers without permission of the owner, the offense is committed by turning off the valve without reference to the intent of the doer. *State v. Moore*, 27 Ind. App. 83; 60 N. E. Rep. 955.

A statute providing that “it shall be unlawful for any person, firm or corporation having possession, or control, of any natural gas or oil well, whether as contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined in such well or proper pipe, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well,” is valid, and is not invalid because of the shortness of the period in which it must be secured. *Given v. State (Ind.)*, 66 N. E. Rep. 750.

court, "in no way deprives the owner of the full and free use of his property. It restrains him from wasting the gas to the injury of others, to the injury of the public." The court likened such a statute to one regulating fishing or hunting, which was enacted to prevent unusual destruction of fish or game, and therefore secure their extinction as food products.⁸

§387. Waste of gas in operating oil well.

A statute prohibiting the waste of gas is not invalid even though such waste is only incidental to the operation of a well, in order to take out oil; and unless such waste is not permitted it cannot be operated. Nor is it invalid even though the value of the gas is trivial compared with the value of the oil that can be taken out of the well by its operation. In fact, though the statute is practically prohibitory, so far as its operation as to an oil well is concerned, still the statute for that reason is not invalid.⁹

§388. Inspection of oil — tests.

There is no doubt that the State has the power to inspect illuminating oil offered for sale, or that will be offered; and to charge the expense of such inspection to its owner.¹⁰ It may prescribe a test for such oil, requiring it to stand a certain reasonable number of degrees of heat without exploding or igniting. Such is only a reasonable regulation for the safety of the inhabitants of the State.¹¹ And there is no doubt that a statute providing for an inspection of oil may exempt oils from inspection inspected in another State under a similar statute.¹² But

⁸ *Townsend v. State*, 147 Ind. 624; 47 N. E. Rep. 19; 37 L. R. A. 294; 62 Am. St. Rep. 477.

⁹ *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. Rep. 576; *State v. Ohio Oil Co.*, 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627; *Given v. State (Ind.)*, 66 N. E. Rep. 750.

¹⁰ *Burkhardt v. Striger (Ky.)*, 67 S. W. Rep. 270; *Louisiana State Board v. Standard Oil Co.*, 107 La. Ann. —; 31 So. Rep. 1015.

¹¹ *Patterson v. Kentucky*, 97 U. S. 501; *Patterson v. Kentucky*, 11 Bush. 311; 21 Amer. Rep. 220; *Foote v. Fire Department*, 5 Hill 99 (gunpowder); *Williams v. Augusta*, 4 Ga. 509 (gunpowder); *Davenport v. Richmond*, 81 Va. 636 (gunpowder).

¹² *In re Robinson*, 28 Tex. App. 511; 13 S. W. Rep. 786.

a city charter authorizing the passage of all ordinances necessary for the trade, commerce, health, and good government of a city, does not authorize the passage of an ordinance requiring vendors of illuminating oils to pay the inspector fees for inspecting the oil.¹³

§389. Ordinance regulating storage of oil.

Under a statute authorizing a municipality to regulate and prevent the storage of combustible or explosive material, an ordinance prohibiting the keeping or storing of explosive oils within a distance of one thousand feet of any dwelling, house, store room, building, barn, shed or other like structure, is reasonable and valid, even as applied to a plant in operation before any other buildings were erected in the neighborhood.¹⁴

§390. Regulating sale of naphtha by United States.

Congress cannot legislate upon the sale of naphtha within the States, nor regulate its sale therein.¹⁵

§391. A charter is a contract.

If a State incorporate a gas company for a particular municipality, or a municipality grant it the right to occupy its

¹³ *Waters-Pierce Oil Co. v. McElroy* (Tex. Cir. App.), 47 S. W. Rep. 272. As to validity of appointment of officers in Alabama, see *State v. McGough*, 118 Ala. 159; 24 So. Rep. 395.

A statute providing that illuminating oils shall be inspected, applies to gasoline, although it must be first transformed into a vapor. *Burkhardt v. Striger* (Ky.), 67 S. W. Rep. 270.

¹⁴ *Standard Oil Co. v. Danville*, 199 Ill. 50; 64 N. E. Rep. 1110, affirming 101 Ill. App. 65.

An ordinance making it unlawful to erect and maintain gas works within certain limits in the city is

valid, coming within the police power. *Dobbins v. Los Angeles* (Cal.), 72 Pac. Rep. 970.

¹⁵ *United States v. Dermitt*, 8 Wall. 41.

Where a statute made it a fine to sell naphtha under any assumed name, and the defendant claimed that the article sold had been combined with chemical agents so as to counteract its explosive qualities as naphtha; it was held that an instruction telling the jury they were to decide whether the article sold "was substantially naphtha or not" afforded him no ground of complaint. *Commonwealth v. Wentworth*, 118 Mass. 441.

streets and supply its inhabitants with gas, a contract is at once created, in the first case between the State and the company, and in the second between the municipality and the company, which is protected by that clause in the Constitution of the United States prohibiting a State from impairing the obligation of a contract.¹⁶ Of course, it must be understood that in granting a gas company a charter the State does not part with its police power to protect its inhabitants in their health and property;¹⁷ and in granting it the right the municipality does not part with its power to also protect its inhabitants in both their health and property.¹⁸

¹⁶ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 10 Am. and Eng. Corp. Cas. 689; 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 671 (reversing 81 Ky. 263; 1 Am. and Eng. Corp. Cas. 156); *State v. Laclède Gaslight Co.*, 102 Mo. 472; 22 Am. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; 14 S. W. Rep. 974; 15 S. W. Rep. 383; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Detroit v. Detroit, etc., Co.*, 184 U. S. 368; 22 Sup. Ct. Rep. 410; *Southwestern, etc., Co. v. Joplin*, 113 Fed. Rep. 817.

¹⁷ *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*; *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Am. and Eng. Corp. Cas. 1; 3 Inter. Com. Rep. 613; *Bath Gaslight Co. v. Claffy*, 74 Hun 638; 26 N. Y. Supp. 287; *Morristown v. East Tennessee, etc., Co.*, 115 Fed. Rep. 304; *Mason v. Ohio, etc., Co.*, 52 W. Va. —; 41 S. E. Rep. 418.

¹⁸ *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 S. Ct. Rep. 77; *Fertilizing Co. v. Hyde Park*, 97 U.

S. 659; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746; 4 Sup. Ct. Rep. 652; *Coates v. Mayor*, 7 Cow. 585; *Mason v. Ohio River R. R. Co.*, 52 W. Va. —; 41 S. E. Rep. 418.

In the *Walla Walla* case the court said: "The grant of a right to supply gas or water to a municipality and its inhabitants through pipes or mains laid in the street, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after the performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

See *Mason v. Ohio River R. R. Co.*, 52 W. Va. —; 41 S. E. Rep. 418; *Traverse City Gas Co. v. Traverse City (Mich.)*, 89 N. W. Rep. 574; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 708; 8 L. R. A. 497.

After the right to occupy the streets has been granted and accepted, the municipality cannot require the lighting company to pay compensation for the use of the ground occupied by its poles. Hot

§392. City cannot fix rates without statutory authority.

A city cannot fix the price of gas supplied by a company under a statute merely authorizing it to provide by ordinance reasonable regulations for its supply, distribution and consumption; nor is such a power conferred under a general welfare clause, such as is usually found in municipal charters or statutes concerning the powers of municipalities.¹⁹ So under a statute providing merely that a municipality may establish "such regulations" of the business of a gas company as it sees fit, it is not authorized to fix rates to be charged after the company has occupied its streets with its pipes under an ordinance granting it leave to do so.²⁰ There is no doubt of the power of the State to delegate to a municipality the authority to fix the rates.²¹

§393. Municipality regulating rates after ordinances granted.

After a municipality has given a gas company the right to occupy its streets, and the company has accepted the grant, there

Springs, etc., Co. v. Hot Springs, 70 Ark. 300; 67 S. W. Rep. 761.

The incorporation of a gas company, either by special act or under the general laws of the State, with power to manufacture and sell gas gives it the implied power to charge and collect reasonable rates for the gas manufactured, and such power forms part of its contract with the State. Capital City Gaslight Co. v. Des Moines, 72 Fed. Rep. 829.

But no charter to make and sell gas is necessary, the making and selling not being a prerogative of the government. Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242.

¹⁹ Lewisville Natural Gas Co. v. State, 135 Ind. 49; 34 N. E. Rep. 702; 21 L. R. A. 734; 43 Am. and Eng. Corp. Cas. 483 (overruling Rushville v. Rushville Natural Gas Co., 132 Ind. 575; 28 N. E. Rep.

853; 38 Am. and Eng. Corp. Cas. 276; 15 L. R. A. 321); Indianapolis v. Consumers' Gas Co., 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Am. and Eng. Corp. Cas. 151; 49 Am. St. Rep. 183; Noblesville v. Noblesville, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032.

²⁰ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398; 49 Am. St. Rep. 280; 12 Am. R. and Corp. Rep. 364. See *Freeport Water Co. v. Freeport*, 180 U. S. 587; affirming 186 Ill. 179; 57 N. E. Rep. 862.

²¹ *Cleveland Gaslight and Coke Co. v. Cleveland*, 71 Fed. Rep. 610; *Capitol City Light and Coke Co. v. Des Moines*, 72 Fed. Rep. 829; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 S. Ct. Rep. 77; *People v. Stephens*, 62 Cal. 209.

exists a contract between them which the city cannot change, unless it has received the power to do so.²² The incorporation of the company, either by a special act or under the general law, with power to make and sell gas, the power to charge and collect reasonable rates for the gas manufacture is implied, and forms a part of the company's contract with the State.²³ And where a statute was in force authorizing the legislature to amend, change or alter the charter of every corporation; and thereafter the legislature granted a company a charter, authorizing it to lay its pipes and sell gas in certain portions of a certain city, and exempted it from the provisions of the statute authorizing amendments by it to the charters of companies; and several years after the charter was so amended as to extend the rights, privileges and franchises of the company throughout the entire corporate limits of such city, it was decided that the right to make and sell gas carried with it the right to fix the price, and that such right was not subject to regulation either by the city or State. The regulation of the price of gas was considered not an exercise of the police power.²⁴

§394. Rates fixed in ordinance granting franchise.

The statement made at the opening of the immediately preceding section is, however, subject to an exception. Thus, if a municipality in granting to a gas company the right to lay its

²² *Indianapolis v. Consumers' etc.*, Co., 140 Ind. 107; 39 N. E. Rep. 433; 48 Am. and Eng. Corp. Cas. 151; 27 L. R. A. 514; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (reversing 81 Ky. 263); 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 271; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; 29 Am. and Eng. Corp. Cas. 257; *New Orleans Gas Co. v. Louisiana Gas Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252; 10 Am. and Eng. Corp. Cas. 689; *Richmond County Gas-*

light Co. v. Middletown, 59 N. Y. 228.

²³ *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829; *Cleveland Gaslight and Coke Co. v. Cleveland*, 71 Fed. Rep. 610; 35 Ohio L. Bull. 155; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339.

²⁴ *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Amer. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; *People v. Kent (Ill.)*, 12 Nat. Corp. Rep. 193.

mains in its streets and to supply consumers gas for private use, fix the amount it may charge them, and the company accept the grant or franchise thus given it, either expressly or by implication in occupying the streets pursuant to the ordinance, it cannot exceed the rate thus fixed; and if it attempt to charge more than is allowed in such ordinance, any consumer within the municipality whom it is attempted to overcharge may successfully maintain an action to enjoin such company overcharging him and from removing his meter in order to enforce its unlawful charge.²⁵ "Having accepted the franchise granted by the ordinance," said the Supreme Court of Indiana, "and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privilege under the grant, and so continuing to do it; it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town, who desire to use its fuel upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance. The town could not by its subsequent action impair or restrict the rights granted to, accepted, and exercised by the appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed by which it is expressly granted."²⁶ In a subsequent case the same court said: "That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate the governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to con-

²⁵ *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033. This case arose under the same statute as did *Louisville, etc., Co. v. State*, *supra*.

²⁶ Citing *Indianapolis v. Consumers', etc., Co.*, 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Amer. and Eng. Corp. Cas. 151. In the case from which the quotation

is made the gas company had given a bond to the town agreeing to comply with the ordinance granting it the right to occupy its streets; and it was a part of such ordinance that the company, in consideration that the town had waived its right to exact a fee for the use of its streets, would adhere to the charges fixed in it for private consumers.

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tract, and it is therefore entitled to the benefits of its bargain." ²⁷ In an ordinance granting a gas company the right to occupy its streets, a municipality may require that it furnish gas free to its public buildings, or even to its places of worship; and the company will be bound by its provisions. In such an instance the relation between the municipality and the gas company is one of contract. ²⁸

§395. Rates fixed by city in its consent to assignment of franchise right.

If the right to assign a franchise granted a gas company requires the consent of such municipality granting it, then in such consent the municipality may fix the rates the assignee may charge private consumers, without any further or other consideration than that involved in consenting to the assignment. ²⁹

§396. Gas company accepting provisions of subsequent ordinance.

A gas company may bind itself by accepting the terms of an ordinance fixing rates passed subsequently to the grant of its franchise; and the right to charge the rates fixed is a sufficient

²⁷ Noblesville v. Noblesville, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032; Sewickley School District v. Ohio Valley Gas Co., 154 Pa. St. 539; 25 Atl. Rep. 868; Newark Gas and Fuel Co. v. Newark, 7 Ohio N. P. 76; Toledo v. N. W. Ohio Natural Gas Co., 5 Ohio C. C. 557; 3 Ohio Cir. D. 273.

²⁸ Sewickley School District v. Ohio Valley Gas Co., 154 Pa. St. 539; 25 Atl. Rep. 868.

Where a company was granted the exclusive right to the streets of a city, under a condition that it was to furnish free gas to the city so long as it occupied the streets; and the city afterwards granted another company the right to oc-

cupy such streets, binding it to have in operation a well connected with pipes within a year, it was held that the latter company did not acquire any rights in the streets until it had fulfilled the condition, and that the first company must continue to furnish free gas until that time. Newark Gas and Fuel Co. v. Newark, 7 Ohio N. P. 76; Toledo v. N. W. Ohio Natural Gas Co., 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531.

²⁹ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398; 49 Am. St. 280. See *Noblesville v. Noblesville, etc., Gas Co.*, 157 Ind. 162; 60 N. E. Rep. 1032.

consideration to make its acceptance binding. Thus where a company was occupying the streets of a town under an ordinance that allowed it to charge reasonable rates (by construction), no rate being specified; and no ordinance was enacted specifying what rates the company could charge, but a subsequent ordinance was passed, enumerating and fixing rates for almost all the instances in which the company had been making a charge; and the company accepted the terms of such subsequent ordinance, it was held that it was bound by such acceptance and could charge only the rates specified, except in those instances where no rate was fixed, where it could charge a reasonable rate.³⁰

§397. Prohibition to change for specified time.

In some States are statutes authorizing the enactment of an ordinance granting the right of a gas company to supply gas within a certain named period, or not to exceed a certain period of time, and providing on the acceptance of such an ordinance that the acceptance and ordinance shall constitute a contract between the municipality and the gas company. Where such a statute prevails, and such an ordinance is accepted, the rates fixed in it cannot be changed during the period of time fixed in the ordinance.³¹ Under such a statute the time when the period of time shall begin to run may be dated ahead, although the period of time from the enactment of the ordinance until the contract shall expire will exceed the length of time for which the municipality is authorized to bind itself by the contract.³²

³⁰ Noblesville v. Noblesville, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032.

Acquiescence in a reduction of rates for several years for each year, will not prevent contest for a reduction in future years, or in years, in which there has been no acquiescence. Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736; 124 Cal. 377.

³¹ Logan Natural Gas, etc., Co. v. Chillicothe, 65 Ohio St. 186; 62 N. E. Rep. 122; Cincinnati Gaslight, etc., Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527; reversing 8 Ohio N. P. 88; 11 Wkly. L. Bull. 216; 13 Wkly. L. Bull. 467; 14 Wkly. L. Bull. 15; State v. Ironton Gas Co., 37 Ohio St. 45.

³² Logan Natural Gas, etc., Co. v. Chillicothe, *supra*.

A contract for a longer time than

§398. Police power.— Rates.

But it must be understood that in parting with its power to fix and determine rates neither the State nor the municipality parts with its police power — the power to protect the lives and the safety of its inhabitants or the safety of its property. It may be said that is a power that neither a State and perhaps a municipality cannot alienate.³³ But the right to exercise the police power is one that must be exercised with due regard to the individual or company affected; under the guise of the right to exercise it, it cannot be so used as to destroy vested rights; and under it the right to regulate a business, it cannot be so used as to confiscate a gas company's business or property without compensation and without due course of law.³⁴

§399. Municipality regulating gas companies.

As a municipality is only an agent of the State in its government, the State may delegate to it its rights under the police power to control or regulate a gas company; and no express provision of the constitution is necessary to enable it to do so.³⁵

the statute allows, or for an indefinite time, will render the time limit of the contract void; and it cannot be urged successfully that it is a contract for the full time allowed by the statute. *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; 16 U. S. App. 588. There is a seeming conflict between this case and the case of *Toledo v. N. W. Ohio Natural Gas Co.*, 5 Ohio C. C. 557.

³³ *State v. Columbus Gaslight, etc., Co.*, 34 Ohio St. 572; 32 Amer. Rep. 390; *Zanesville v. Zanesville Gaslight Co.*, 47 Ohio St. 1; 23 N. E. Rep. 555; 29 Am. and Eng. Corp. Cas. 190; *Jamieson v. Indiana Nat. Gas, etc., Co.*, 128 Ind. 555; 28 N. E. Rep. 76; 12 L. R. A. 652; 34 Amer. and Eng. Corp. Cas. 1; *New Orleans Gas Co. v. Louisiana Light*

Co., 115 U. S. 650; 10 Am. and Eng. Corp. Cas. 639; 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 (reversing 81 Ky. 156; 1 Am. and Eng. Corp. Cas. 156); 6 Sup. Ct. Rep. 265; 10 Am. and Eng. Corp. Cas. 671; *Bath Gaslight Co. v. Claffy*, 74 Hun 638; 26 N. Y. Supp. 287; *Mason v. Ohio River R. R. Co.*, 52 W. Va. 41; 41 S. E. Rep. 418.

³⁴ *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23; 23 Atl. Rep. 485.

³⁵ *Garrison v. Chicago*, 7 Biss. 480; *Indianapolis v. Indianapolis Gaslight, etc., Co.*, 66 Ind. 396; *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474; 8 Amer. St. Rep. 544; 4 So. Rep. 215; *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep.

Under the right delegated to regulate gas companies, however, a municipality may not violate any right granted a company in its charter.³⁶ Nor can the municipality under its power to regulate a gas company break or impair a contract it has with the company for municipal lighting, or lighting its streets and public highways.³⁷ A municipality has the inherent and implied police power to require all gas companies operating within its limits, to use all reasonable regulations to protect its inhabitants, independent of any statute expressly authorizing it so to do.³⁸ This proposition is emphasized when it is borne in mind that a municipality cannot by contract impair its police power over gas and other like companies, to protect its inhabitants in their health and property from their operations.³⁹

§400. Power to change rates—rates established must be reasonable.

Where a statute is in force authorizing a municipality to change or regulate rates for gas charged private consumers, the municipality cannot fix the rate so low that the company cannot manufacture and supply gas. The rate must be reasonable;

829; *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033; *Zanesville v. Louisville Gaslight Co.*, 47 Ohio St. 1; 23 N. E. Rep. 55; 29 Am. and Eng. Corp. Cas. 190.

³⁶ *District of Columbia v. Washington Gaslight Co.*, 20 D. C. 39; *Pittsburgh's Appeal*, 115 Pa. St. 4; 7 Atl. Rep. 778; *Northern Liberties v. Northern Liberties Gas Co.*, *supra*.

³⁷ *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829; *Levis v. Newton*, 75 Fed. Rep. 884; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107; 39 N. E. Rep. 433; 48 Am. and Eng. Corp. Cas. 151; 49 Am. St. Rep. 183; 27 L. R. A. 514; *State v. Laclède Gaslight*

Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Amer. St. Rep. 789; 34 Am. and Eng. Corp. Cas. 49; *Indianapolis v. Indianapolis Gaslight, etc., Co.*, 66 Ind. 396.

³⁸ *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Rushville v. Rushville, etc., Gas Co.*, 132 Ind. 575; 28 N. E. Rep. 853; 15 L. R. A. 321 (overruled on the right to regulate the price of gas.)

³⁹ *East St. Louis v. East St. Louis Gas, etc., Co.*, 98 Ill. 415; 38 Am. Rep. 97; *Meadville Fuel Gas Co.'s Appeal (Pa.)*, 4 Atl. Rep. 733; 14 Am. and Eng. Corp. Cas. 123; *Indianapolis v. Consumers' Trust Co.*, 140 Ind. 107; 39 N. E. Rep. 483; 49 Am. St. Rep. 183; 48 Am. and Eng. Corp. Cas. 151; 27 L. R. A. 514.

and if not reasonable, the ordinance changing the rate imposes no obligations upon the company.⁴⁰ The granting of a charter to a company to manufacture and supply gas creates an implied contract with the State giving the company the right to charge a reasonable rate for all gas furnished, which cannot be impaired.⁴¹ Under such a power a municipality cannot fix a rate so low as to work a practical confiscation of the company's plant; but due regard must be had to the right of the company to receive such an income from its business as will pay operating expenses, legitimate charges, and a reasonable profit.⁴² The reasonableness of the rate fixed is a matter for judicial inquiry;⁴³ and a court of equity has the power to set aside such ordinance and direct the municipality to fix such rates as the statute authorizes.⁴⁴ Before the courts can interfere it must appear that the rates fixed are so plainly and palpably unrea-

⁴⁰ *State v. Cincinnati, etc., Co.*, 18 Ohio St. 262; *Logan Natural Gas, etc., Co. v. Chillicothe*, 65 Ohio St. 186; 62 N. E. Rep. 122.

⁴¹ *Cleveland, etc., Co. v. Cleveland*, 71 Fed. Rep. 610; 35 Ohio L. Jr. 155; *Toledo v. N. W. Natural Gas Co.*, 8 Ohio S. and C. P. Dec. 277; *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829; *New Memphis Gas Co. v. Memphis*, 72 Fed. Rep. 952; *Los Angeles v. Los Angeles, etc., Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; affirming 88 Fed. Rep. 720; *Cincinnati, etc., Ry. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *People's Gaslight and Coke Co. v. Chicago*, 114 Fed. Rep. 384.

⁴² *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Waddington v. Allegheny Heating Co.*, 6 Pa. Co. Ct. Rep. 96; *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046; *San Diego, etc., Co. v. Jasper*, 110 Fed. Rep. 702; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep.

245; *San Joaquin, etc., Co. v. Stanislaus County*, 113 Fed. Rep. 930.

If a municipality lease its own gas works to a company, providing in the lease that its council may fix the rates, but not below the then existing rates, the proviso is a limitation upon its right to regulate rates, and not a mere granting back by the lessee of the right of the municipality in its proprietary capacity only. *Los Angeles v. Los Angeles, etc., Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736, affirming 88 Fed. Rep. 720.

⁴³ *Capitol City Gas Co. v. Des Moines*, 72 Fed. Rep. 829; *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Agua Pura Co. v. Las Vegas*, 10 N. M. 6; 60 Pac. Rep. 208; 50 L. R. A. 224.

⁴⁴ *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1086; *Osborne v. San Diego, etc., Co.*, 178 U. S. 22; 20 Sup. Ct. Rep. 860; affirming 76 Fed. Rep. 319; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

sonable as to make their enforcement equivalent to the taking of private property for public use without proper compensation.⁴⁵ In discussing this question at great length the Supreme Court of the United States by Justice Harlan has said: "The contention of the appellant [a water company] in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into the consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should

⁴⁵ San Diego, etc., Co. v. Jasper, 111 Fed. Rep. 702. See People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406, and San Diego, etc., Co. v. San Diego, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; 62 Am. St. Rep. 261. In this case three and one-third per cent upon the actual cost of the plant after deducting current expenses was held

to not constitute a just compensation.

A reduction of the company's income need not be shown to establish the fact that the reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction. Los Angeles, etc., Co. v. Los Angeles, 88 Fed. Rep. 720; affirmed 177 U. S. 558; 20 S. Ct. Rep. 736.

in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.”⁴⁶ In another case, involving turnpike rates, it was said: “Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the facts prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public.”⁴⁷ If the municipality, having the authority to fix rates, do not do so, then the gas company may fix its rates at such a reasonable figure as it sees fit, unless some express provision of a statute or an ordinance prohibit its so doing.⁴⁸ Where a municipality with authority to fix rates does

⁴⁶ *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79. It was also held that the cost of outside ventures could not be considered in determining the rates. *New Memphis Gaslight and Coke Co. v. Memphis*, 72 Fed. Rep. 952. In *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. Rep. 15, evidence of the cost of the water works was held to be irrelevant in fixing the rates. Nor can expenses of litigation in contesting the validity of an ordinance in fixing the rates be considered. *San Diego Water Co.*

v. San Diego, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; 62 Am. St. Rep. 261.

⁴⁷ *Covington, etc., Co. v. Sandford*, 164 U. S. 578. See *Chicago, etc., Ry. v. Minnesota*, 134 U. S. 418.

⁴⁸ *Lanning v. Osborne*, 76 Fed. Rep. 319; affirmed *Osborne v. San Diego, etc., Co.*, 178 U. S. 22; 20 Sup. Ct. Rep. 860. In this case it was held that the annual rates as first fixed were not made irrevocable by a contract for the sale of water rights for a fixed sum, providing, in

so, it will be presumed that the rates are reasonable; and the gas company has the burden to show that it is not.⁴⁹ If there be no restriction upon the company in fixing the price, it is authorized to fix it at a reasonable figure;⁵⁰ and the presumption is that the price at which it fixes it is a reasonable one.⁵¹ In a case involving rates, analogous to the rates of a gas company, the Supreme Court of the United States has used the following language: "The judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."⁵² Under its power to change the rates a municipi-

addition, for the payment of such annual rates to "be fixed by the water company as allowed by law."

Power given to a municipal body to fix rates does not make it a part of the legislative department of the State. *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046. See *Lanning v. Osborne*, 82 Fed. Rep. 575.

⁴⁹ *Capitol City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829. See *State v. Ironton*, 37 Ohio St. 45; *Toledo v. N. W. Ohio Natural Gas Co.*, 3 Ohio Cir. Ct. Dec. 273; 5 Ohio Cir. Ct. 557; *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185. That the motives of the common council in fixing the price may be inquired into, see *State v. Cincinnati Gaslight, etc., Co.*, 18 Ohio St. 262.

⁵⁰ *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; 38 S. W. Rep. 703.

⁵¹ *Bellaire Goblet Co. v. Findlay*, 3 Ohio Cir. Dec. 205; 5 Ohio C. C. 418; *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032.

⁵² *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79; citing *Chicago, etc., Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. p. 524; and *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592.

See the following analogous cases: *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; *Spring Valley W. W. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046; *Spring Valley W. W. v. Bryant*, 52

pality need not give notice of its intention to do so,⁵³ unless a statute requires it; and this is especially true where the company must furnish data to enable the municipality to determine

Cal. 132; *Spring Valley W. W. v. Bartlett*, 63 Cal. 245; *San Diego W. Co. v. San Diego*, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460; *Redlands Domestic Water Co. v. Redlands*, 120 Cal. 312; 53 Pac. Rep. 843.

A company is not estopped to contest the validity of an ordinance fixing rates in violation of a contract between the city and the grantors of the company, merely because for fifteen years it has collected the rates established by similarly objectionable ordinances, where it has annually protested against the city's conduct. *Los Angeles v. Los Angeles, etc., Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; affirming 88 Fed. Rep. 720.

A failure of a gas company to furnish gas at a rate specified in an ordinance, upon which condition its charter was granted, is not excused by the passage of a subsequent ordinance for the repeal of the former one. Such a repealing ordinance is nothing more than a wrongful assertion by the town of a right to rescind its contract. *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616; affirming 27 Ill. App. 346.

An ordinance authorizing a company to charge consumers during the continuance of the privilege granted, certain named rates or "other rates that may be established" by the company and approved by the municipal authorities, does not exclude future regulation of the rates charged, in violation of a statute authorizing the municipality to fix the charges.

Creston W. W. Co. v. Creston, 101 Ia. 687; 70 N. W. Rep. 739.

In determining whether or not the rates are reasonable, bonds issued for patents which have expired, or for patents not used, cannot be considered. Nor can the rental of land owned by the company but not used as a plant be considered as a proper expense. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 829.

The change of rates so as to impair the original contract raises a question giving the Federal courts jurisdiction. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

In determining the rate the municipality may take into consideration the earnings in the past. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

The court cannot fix the rate; it can only determine whether or not the rates as fixed by the municipality are reasonable. *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

The constitution and statute of California authorizing Boards of Supervisors to fix rates at which water shall be sold by a corporation furnishing water to the public does not apply to a corporation organized to furnish water to its stockholders only. *McFadden v. Los Angeles County*, 74 Cal. 571; 16 Pac. Rep. 397.

⁵³ *Spring Valley, etc., Co. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046; *Budd v. New York*, 143 U. S. 517; 12 S. Ct. Rep. 468.

what the rates shall be, and it has been called upon by such city, before fixing the rates, to furnish such data.⁵⁴

⁵⁴ *San Diego Land Co. v. National City*, 174 U. S. 739; affirming 74 Fed. Rep. 79.

A water company cannot exact any sum of money or other thing in addition to the legally established rates as a condition upon which it will furnish water. *Lanning v. Osborne*, 76 Fed. Rep. 319.

The current expenses which may be considered in determining the sufficiency of the income provided by water rates consist of the amount of money which is properly and reasonably expended each year in the collection and distribution of water. *San Diego Water Co. v. San Diego*, 118 Cal. 556; 50 Pac. Rep. 633; 38 L. R. A. 460.

Where the water is to be furnished under a contract fixing the rate, the reasonableness of such rates is not a matter of consideration. *Leadville Water Co. v. Leadville*, 22 Colo. 297; 45 Pac. Rep. 362.

The court is not limited to the evidence heard by the municipal board in fixing the rates where the hearing was conducted without notice to the company and without any right on its part to intervene effectually. *San Diego Water Co. v. San Diego*, *supra*.

In Pennsylvania if the rates yield no more than is required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund, for the payment of debts, and pay a fair profit to the owners, they are not so unreasonable that the courts will reduce them. Under the statute in that State the power of the courts

to decrease rates is limited to a reduction of the rates which are specifically charged to be excessive, and does not include the right to form an entirely new schedule of prices covering the company's entire business. *Brymer v. Butler Water Co.*, 179 Pa. St. 331; 27 Pitts. L. J. (N. S.) 285; 39 W. N. C. 439; 36 Atl. Rep. 249; 36 L. R. A. 260.

Under a power reserved to prescribe from time to time rules and regulations for the running and operation of a street railway, a city cannot prescribe the rate of fare. *Detroit v. Detroit, etc., Co.*, 184 U. S. 368; 22 Sup. Ct. Rep. 410.

As to consolidation of gas companies, by some of which is reserved the right to fix the rates, and some not, see *People's Gaslight and Coke Co. v. Chicago*, 114 Fed. Rep. 384. See also *Rogers Park Water Co. v. Fergus*, 178 Ill. 571; 53 N. E. Rep. 363.

Power in a city to secure a reduction in rates by arbitration does not authorize the city itself to change the rate. *Des Moines v. Des Moines W. W. Co.*, 95 Iowa 348; 64 N. W. Rep. 269.

The acceptance by a gas company of the provisions of a city ordinance in which it is reserved the right of the city council to fix the price charged for gas after ten years, the council at the end of the ten-year term may fix the rates, which will be conclusive on both the company and the public, and which cannot be interfered with by the courts in the absence of a showing of fraud or bad faith. *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185.

§401. Gas companies quasi public corporations — rates may be changed.

There is a general tendency in the courts to get away from the earlier decisions; and while not *in enomine* overturning these decisions, yet to give grants to gas and water companies a strict construction, and to hold that a State or city may revise the company's rates unless the express words of the grant prohibit it. The line of reasoning is that such companies are quasi-corporations, charged with a public duty to supply an article necessary to municipal life — a duty that the municipality itself may perform and which it has delegated to another to perform for it — that it enjoys a privilege necessarily often of a monopolistic character, a privilege granted it by the public, and from which it derives a financial benefit; and that by the acceptance of such a grant or privilege it devotes its property in a measure to public use, and is therefore more subject to State or municipal control or regulation than if it were purely a private corporation.⁵⁵ These decisions find an illustration in an Illinois case arising out of the annexation of the village of Rogers Park by the city of Chicago. In 1888 Rogers Park granted to a water company the right to lay water pipes in its street in order to supply it and its inhabitants with water during the period of thirty years at a rate fixed by the ordinance. In 1893 the village was annexed to the city of Chicago, and four years afterwards the Chicago common council provided by ordinance that the rates in the annexed territory should be

⁵⁵ *State v. Cincinnati Gaslight and Coke Co.*, 18 Ohio St. 262; *Logan Natural Gas and Fuel Co. v. Chillicothe*, 65 Ohio St. 186; 62 N. E. Rep. 122; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; 29 Amer. and Eng. Corp. Cas. 257; *Toledo v. N. W. Ohio, etc., Co.*, 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531; 5 Ohio Cir. Ct. Rep. 557; *Cincinnati Gaslight and Coke Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527; *Pocatello Water Co. v. Standley* (Idaho), 61 Pac. Rep. 518; *Fellows v. Walker*, 39 Fed. Rep. 651; *Cincinnati, etc., Ry. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406; *Waddington v. Allegheny Heating Co.*, 6 Pa. Ct. Rep. 96; *Tacoma Gas, etc., Co. v. Tacoma*, 14 Wash. 288; 44 Pac. Rep. 655; *Tampa v. Tampa W. W. Co.* (Fla.), 34 So. Rep. 631.

the same as they were in that portion of Chicago not embraced in the annexed territory, which were considerably below the rates that had existed in the new territory before its annexation. The water company contended that it was not bound by the new ordinance, for the reason that it violated the State constitution in that clause which forbade the enactment of a law impairing the obligation of a contract; and that until the thirty years had expired it was entitled to supply the territory formerly embraced in Rogers Park at the rates established in the first ordinance. But the Supreme Court of that State held that its contention could not be sustained. "The village exercised the power," said the court, "by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumers. This provision of the ordinance had not the effect to establish a contract between the company and the village that the individual inhabitants of the village should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie*, that the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty, not a proposition looking towards a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty. Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys, and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the State to enforce that duty is not ex-

hausted by its exercise in the first or any subsequent instance, but is continuous, and may be asserted from time to time, whenever necessary to prevent extortion by the agency created by the State to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. In the exercise of that power by the State, or by a municipality exercising the power by delegation from the State, there is no admixture whatever of any contractual element; nor does the corporation against whom the power is exercised obtain any vested property or property right in the sale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation. The annexation of the village of Rogers Park to the city of Chicago operated to clothe the city council of the city with ample authority to determine, *prima facie*, whether the rates demanded by the company for water applied to the inhabitants of that part of the city which was formerly within the limits of the village were reasonable, and to enact an ordinance reducing such rates if deemed by it to be extortionate."⁵⁶

§402. Same continued. — Rates may be changed.

The question receives further exposition in another and earlier Illinois case. A water company was organized in November, 1882, to supply the city of Danville with water, pursuant to an Act of the legislature providing that "the General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of" the Act.⁵⁷ By the provisions of an ordinance of the city of Danville under which the company received its right to occupy the streets of that city and

⁵⁶ Rogers Park Water Co. v. Ferguson, 178 Ill. 571; 53 N. E. Rep. 363; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406.

It was also held in this case that the signing of an application by the consumer for water, subject to the regulations thereafter to be adopted,

was not such a contract as bound him to continue to pay the rates of the company permitted by the ordinance when the application was made before the reduction was attempted.

⁵⁷ 1 Starr and Curt. Ann. Stat. (2d ed.), p. 1006, Sec. 9.

supply its inhabitants with water the rates for city hydrants were fixed for the term of thirty years; and the company furnished to the city water at those rates for years until 1895, when the common council adopted a new ordinance, lowering the rates for hydrants from \$62.50 per annum for the first 100, and all others \$50, to \$50 per annum for the first 140, and \$40 for all others; which ordinance the company refused to accept. The city was authorized by statute to enter into a contract, at the time it did so, "for a supply of water for public use, for a period not exceeding thirty years."⁵⁸ This Act was silent as to the rates to be charged and as to the mode of fixing them; but a statute one day later in date empowered a city "to authorize any person or private corporation to construct and maintain water works" at such rates as might be fixed by ordinance for a period not exceeding thirty years.⁵⁹ In 1891 an Act of the legislature was passed authorizing a city in which was a corporation supplying it and its inhabitants with water "to prescribe by ordinance maximum rates and charges for the supply of water furnished by such . . . corporation to such city . . . and the inhabitants thereof, such rates and charges to be just and reasonable"; and if the rates were unjust and unreasonable, the Circuit Court was empowered to review and determine them. The company refused to accept the provisions of the ordinance of 1895, claiming that it was a violation of its contract with the city; and brought suit to recover a year's rental under the old ordinance. The court held the new ordinance was valid; and that the company could only recover according to the rates fixed by it. The court said that the "authority to contract for a supply of water for public use for a period not exceeding thirty years" did "not necessarily provide that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law."⁶⁰ The

⁵⁸ 1 Starr and Curt. Ann. Stat. p. 545.

⁵⁹ Citing *Carlyle v. Carlyle, etc.*, Co. 52 Ill. App. 577.

⁶⁰ 1 Starr and Curt. Ann. Stat. p. 508.

court admitted that the statute under which the company was formed was silent on the question of rates, but said: "Where the charter of a gas or water company in a city does not expressly confer on the company the right to fix its own prices, such silence cannot be construed into a grant of the franchise to fix its own rates. So, here, the silence of the Act as to the rates to be charged does not necessarily confer upon the municipality the power to fix one established rate for the whole period during which the contract is to run. If, however, it be doubtful whether the language of the Act does or does not confer the power upon cities to contract for a supply of water at a fixed rate for the whole period of thirty years, such doubt must be resolved in favor of the public." The court then proceeds to say: "The clause 'for a period not exceeding thirty years' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.' In other words, the council may authorize a private corporation to construct and maintain water works for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the water works at such rates as may from time to time be fixed by ordinance."⁶¹ Another case of the same character was that of the city of Freeport, in which a like decision was made.⁶² Appeals from these decisions were taken to the Supreme Court of the United States, and the cases affirmed; but the decisions were put upon grounds slightly different from that of the Illinois court, as will appear in the following extract from the opinion in the Freeport case: "Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or

⁶¹ *Danville v. Danville Water Co.*, 178 Ill. 299; 53 N. E. Rep. 118; 180 Ill. 235; 54 N. E. Rep. 224. In another case between the same parties (186 Ill. 326; 57 N. E. Rep. 1129), the court renders a short opinion, referring to the opinion from which the above quotation is made; and this case in which the

short opinion is rendered is affirmed on appeal to the Supreme 862. See also *Tampa v. Tampa W. W. Co.*, 34 So. Rep. 631.

⁶² *Freeport Water Co. v. Freeport*, 186 Ill. 179; 57 N. E. Rep. 862. See also *Tampa v. Tampa W. W. Co.*, 34 So. Rep. 631.

corporation to construct and maintain water works *at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.* The words '*fixed by ordinance,*' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as both parties might require at a particular time."⁶³ Where a gas company, organized before any statute or constitutional provision, authorized a regulation of it by the State or a municipality, was authorized to charge not to exceed three dollars per thousand feet, after such a statute was enacted, consolidated, pursuant to a statute authorizing it to do so, subject to the conditions resting upon each of them, none of them being in fact extinguished, it was held that it subjected itself to regulations, with respect to its rates, by the municipality, and could only charge the rates allowed by the companies it had absorbed.⁶⁴

§403. Same continued — rates may be changed.

The Supreme Court of Ohio holds that gas companies, because of their peculiar relation to the public, are such corporations as their rates to private consumers may be changed by the legislature or by a municipality in pursuance of a statute authorizing it to make a change. In 1849 the legislature chartered the

⁶³ *Freeport Water Co. v. Freeport City*, 180 U. S. 587; 21 S. Ct. 493; affirming 186 Ill. 179; 57 N. E. Rep. 862; *Danville Water Co. v. Danville*, 180 U. S. 619; 21 St. Ct. 505; affirming 186 Ill. 326; 57 N. E. Rep. 1129; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624.

⁶⁴ *People's Gaslight and Coke Co. v. Chicago*, 114 Fed. Rep. 384.

The constitution of the State of Washington authorizes a municipality of a specified population to form a charter for its own government

"consistent with and subject to" its provisions and the laws of the State. A general law authorized a municipality of the population specified to regulate and control the "use" of gas, but contained no provision as to the price. It was held that the city could not adopt a charter empowering it to fix the price of that commodity to be furnished its inhabitants. *Tacoma Gas, etc., Co. v. Tacoma*, 14 Wash. 288; 44 Pac. Rep. 655.

Zanesville Gaslight Company; and in the same year the city of Zanesville authorized this company to lay its pipes in the city's streets and alleys, providing that so long as it enjoyed the privilege granted it should supply the "town council" with gas at a price not to exceed two dollars and fifty cents a thousand cubic feet. At that time the city had no legislative authority to regulate the price of gas. Subsequently the legislature enacted a statute authorizing municipalities to fix the price at which gas should be sold by gas companies; and the city of Zanesville thereafter in 1884 fixed the price to itself and its citizens at one dollar and twenty-five cents per thousand cubic feet. The gas company never accepted the provisions of this last statute nor of this last ordinance. But the Supreme Court held that it could not charge more than the price fixed by the last ordinance, invoking the doctrine of *Munn v. Illinois*,⁶⁵ and holding that it was such a quasi-public corporation, enjoying special privileges of such a public character that its rates were subject to legislative control.⁶⁶ A case in the Federal Circuit Court for the Southern District of Ohio illustrates how far the courts are inclined to go to enable the State or a municipality to regulate the rates of gas or water. On March 18, 1887, the city of Dayton, pursuant to statutes authorizing it to do so, adopted an ordinance giving a natural gas company the right to lay its mains in the streets and supply the inhabitants of the city with gas, giving it eighteen months in which to introduce the gas, and providing that if this was not done by January 1, 1889, the city might, by resolution, declare a forfeiture of the company's franchise. The company accepted the provisions of the ordinance, began to lay its pipes in the streets, but failed to complete the enterprise or to supply gas by January 1, 1889.

⁶⁵ 94 U. S. 113.

⁶⁶ *Zanesville Gaslight Co. v. Zanesville*, 47 Ohio St. 35; 23 N. E. Rep. 60; 23 Wkly. L. Bull. 70; 29 Am. and Eng. Corp. Cas. 190; *State v. Cleveland, etc., Co.*, 3 Ohio Cir. Ct. 251; *State v. Columbus, etc., Co.*, 34 Ohio St. 572; *Toledo v. Northwestern, etc., Co.*, 5 Ohio Cir.

Ct. 557; 3 Ohio Dec. 273; *Toledo v. Northwestern, etc., Co.*, 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531. See *Spring Valley W. W. v. Schottler*, 110 U. S. 347; *Agua Pura Co. v. Las Vegas*, 10 N. M. 6; 60 Pac. Rep. 208; 50 L. R. A. 224. See also *Tampa v. Tampa W. W. Co.*, 34 So. Rep. 631.

On February 2, 1889, the city declared all its rights forfeited. Meantime, on December 23, 1887, it passed an ordinance fixing the maximum prices the company should have a right to charge for gas furnished for fuel purposes by mixers for the next ensuing five years, which ordinance the company accepted. On March 28, 1889, the name of the company having been changed, the city passed an ordinance granting to it the right to occupy its streets, for the term of twenty years, with the object of furnishing gas "for heating, fuel, and power purposes only"; and in it provided that any consumer should have the right to require gas to be furnished by meter measurement, at a rate not to exceed a certain figure, and not by the former schedule rates, the company to furnish the meter at a rental of three dollars a year, payable in advance. The meter rate was considerably lower than the former rate. A subsequent section provided that "the contract heretofore made between the city and this company, as to schedule of prices, shall be in full force, except as herein altered, and for the unexpired time of said original contract." The contract under the ordinance of December 23, 1887, expired January 10, 1893. Shortly after the company went into the hands of a receiver, who claimed that after January 10, 1893, there was no rate fixed by the council that was operative and in force; and proceeded to carry into effect a resolution of the gas company, adopted in anticipation of the termination of the contract created by the ordinance of December 23, 1887, as modified by that of March 28, 1889, and advanced the rates to nearly double what they had been by the meter measurements. Before any of these ordinances were adopted a statute had been enacted authorizing city councils "to regulate, from time to time, the price" which natural gas companies could charge for natural gas "for lighting or fuel purposes," and providing that the companies could not charge more than the price then fixed. The statute also provided that if the council fixed "the maximum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets . . . for a period not exceeding ten years, and the company assents thereto by

written acceptance . . . it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed upon, not exceeding ten years as aforesaid." The court held that after the five years' rate expired, as provided for by the ordinance of December 23, 1887, the rates provided by the ordinance of March 28, 1889, were in force. The court adopted the reasoning of the Supreme Court of the State of Ohio, and followed the construction it had given to the statute cited.⁶⁷ On appeal the case was affirmed, the court holding that the provisions for a maximum rate was not a contract for any period, but an exercise of the power to regulate, and a limitation on the license granted, and continued in force after the expiration of the original contract, and until repealed. The court also held that when a municipality is authorized to enter into a contract for a period not to exceed ten years, its contract for twenty years, or for an indefinite time, is entirely void, and that it cannot be sustained as a contract for ten years.⁶⁸

§404. Municipality delegating power to change rates.

If a statute (or an ordinance) empowers a municipality to fix and regulate rates, the governing body of such municipality, or the body especially authorized to fix or regulate the rate must do it; and the power to fix or regulate it cannot be delegated to any other person or body than the one named in the statute or

⁶⁷ *Manhattan Trust Co. v. Dayton Natural Gas Co.*, 55 Fed. Rep. 181.

⁶⁸ *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; 16 U. S. App. 588.

The case of the *Cleveland Gas-light and Coke Co. v. Cleveland*, 71 Fed. Rep. 610, 35 Ohio L. J. 155, is not so much at variance with the Ohio cases as would at first seem. The gas company's charter dated from 1846, and it was occupying the streets when the constitution of 1850 was adopted, by a pro-

vision of which a statute may be enacted to regulate corporations. The syllabus would lead one to think that the court rested its decision upon the unconstitutionality of this statute; but the decision is based upon the fact that the bill for an injunction charged, which the demurrer admitted, that the price fixed by the municipality was so low that gas could not be manufactured at the figure named. The court said the rates fixed must be reasonable.

ordinance. Nor can a contract with a gas company be made that will authorize some body other than the one named in the statute to regulate the price.⁶⁹ But where the constitution of a State provided that private corporations might be formed under general laws, which laws might be altered or repealed from time to time; and pursuant to its provisions a company was chartered, providing that the rates might be fixed by a board composed of two members appointed by the municipality, two appointed by the company and the fifth by the four; and thereafter a new constitution was adopted providing that the rates should be fixed by the city and county board of supervisors, it was held that the charter was subject to changes according to the rights reserved in the first constitution, and it was not impaired by the last constitution.⁷⁰ Yet where a statute provided "that the board of gas trustees may prescribe by by-laws the price of gas and coke, under such rules and regulations as by ordinance the council may prescribe," it was held that the action of the trustees in raising the price of gas without an ordinance authorizing them so to do was void.⁷¹

§405. Annexing territory after contract made.

If a city has a contract with a gas company to supply gas at a certain fixed price, and thereafter extends its limits, the rate so fixed will be applicable to the territory annexed.⁷² Thus where a gas company, pursuant to statutory authority, extending its gas mains into a village where it is vested with the right to lay its mains, and uses such mains to convey to such village gas manufactured by it, and uses its manufactory and mains as

⁶⁹ Cincinnati Gaslight and Coke Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527. See Schwede v. Heinrich, etc., Co., 20 Wash. —; 69 Pac. Rep. 362.

⁷⁰ Spring Valley W. W. v. Schottler, 110 U. S. 347; 4 Sup. Ct. Rep. 48; Spring Valley W. W. v. Bartlett, 16 Fed. Rep. 615; Spring Val-

ley W. W. v. San Francisco, 61 Cal. 3.

⁷¹ Foster v. Findlay, 5 Ohio Cir. Ct. 455; 3 Ohio Cir. Dec. 224.

⁷² See People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

one plant, it was regarded as established in the village, within the meaning of a statute giving a municipality power to regulate the price of gas; and such extension of the mains was regarded as the extension of the gas works for supplying the village with gas, within the meaning of a statute authorizing the council "to agree, by ordinance, with any person or persons, for the . . . extension of gas works . . . for supplying the corporation or its inhabitants with gas."⁷³

§406. Police power regulations.

As an instance of the exercise of the police power by a municipality, is the removal of a lamp-post where the public convenience requires it, and no contractual relation with the gas company prohibits it. In such an instance the power to remove it may be delegated.⁷⁴ So an ordinance adopted subsequent to the granting of a franchise may provide for an inspection of meters.⁷⁵ So in the case of a water company (and no doubt the same is true of a gas company) a municipality may take such measures as may be necessary to secure pure water, "the pay of its [the company's] just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which pipes and mains of the company should be laid through the streets."⁷⁶

⁷³ Cincinnati Gaslight and Coke Co. v. Avondale, 43 Ohio St. 257; 1 N. E. Rep. 527. See also Rogers Park Water Co. v. Fergus, 180 U. S. 624; 21 S. Ct. Rep. 490, affirming 178 Ill. 571; 53 N. E. Rep. 563, and People's Gaslight and Coke Co. v. Chicago, 114 Fed. Rep. 384.

⁷⁴ New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474; 4 So. Rep.

215; 8 Am. St. Rep. 844; 20 Am. and Eng. Corp. Cas. 258.

⁷⁵ Cincinnati, etc., Co. v. State, 18 Ohio St. 237.

⁷⁶ Walla Walla Water Co. v. Walla Walla, 172 U. S. 1; New York v. Squire, 145 U. S. 175; St. Louis v. Western U. Tel. Co., 148 U. S. 92; Missouri, etc., Co. v. Murphy, 170 U. S. 78, affirming 130 Mo. 10; 31 S. W. Rep. 594.

CHAPTER XXI.

CONTRACTS FOR MUNICIPAL LIGHTING.

- §407. Power to make contract.
- §408. Constitutional or statutory limitations on indebtedness.
- §409. Length of term of contract.
- §410. Extending term of contract.
- §411. Bids for lighting.
- §412. How contract executed.
- §413. Liability of city for breach of contract.— Damages.
- §414. Assignment of lighting contract.
- §415. Rescission of contract.— Breach.
- §416. Discontinuing use of gas.
- §417. Changing contract.
- §418. Gas furnished not covered by contract.— No contract.
- §419. Municipality extending limits after making contract.
- §420. Municipality receiving light under a void contract.
- §421. Contracts void for uncertainty.
- §422. Moonlight schedule.
- §423. The price to be paid.
- §424. Free light.
- §425. Exemption from taxation in fixing price of gas.
- §426. Cost of light, out of what fund paid.
- §427. Appropriation for light, when necessary to validity of contract.
- §428. Exhaustion of appropriation as a defense.
- §429. Tax to pay for gas or to support gas plant.
- §430. Assessing cost of public lighting upon abutting property.— Cost of municipal plant.
- §431. Mandamus to compel auditing of payment of bills.
- §432. Action to recover for gas supplied.
- §433. Interest.
- §434. Lamps — Posts.
- §435. United States revenue tax.
- §436. Waiver as to quality of gas or light.
- §437. Extending mains, failure to pay for light.
- §438. Receiver bound by contract.
- §439. Municipal officer interested in contract.

§407. Power to make contract.

There has never been any denial of the power of a municipality to make a contract for lighting its streets and public

buildings worthy of regard. Whether it is its duty or not to light its streets and public places, the right to make such contracts is unquestioned, whether a statute expressly authorizes it or not. "A municipal corporation," said the Supreme Court of Indiana, "not having either body or limbs, feet or hands, but being merely a legal entity cannot execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and agree to pay them is to make a contract; and if it could not make such contracts, and was not bound thereby, it could not carry on the purposes or attain the objects for which it was established. Its ordinances will not execute themselves; and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power — not *ultra vires* — which is not against public policy, and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person." When a municipality enters into a contract with an individual or a corporation for the lighting of its streets it acts by its power to contract, and not in its legislative capacity — in its private capacity, as has been said, and not in its public capacity.¹ Officers acting under the charter have the power to bind the mu-

¹ Indianapolis v. Indianapolis Gaslight and Coke Co., 66 Ind. 396; Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514; 48 Amer. and Eng. Corp. Cas. 151; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Richmond County Gas Co. v. Middleton, 59 N. Y. 228; Harlem Gaslight Co. v. Mayor, 33 N. Y. 309, affirming 3 Robt. 100; Davenport Gaslight Co. v. Davenport, 13 Ia. 229; State v. Milwaukee Gaslight Co., 29 Wis. 454; 9 Am. Rep. 598; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; Philadelphia v. Fox, 64 Pa. St. 169; Garrison v. Chicago, 7 Biss. 480; Nebraska City v. Nebraska, etc., Co., 9 Neb. 339; 2 N. W. Rep. 870; Keihl v. South Bend, 76 Fed. Rep. 921; 44 U. S. App. 687; 22 C. C. A. 618; 36 L. R. A. 228; Waymart Water Co. v. Waymart, 4 Pa. Supr. Ct. 211; Winfield v. Winfield Gas Co., 37 Kan. 24; 14 Pac. Rep. 499; Conyers v. Kirk, 78 Ga. 480; 3 S. E. Rep. 442; Anoka W. W., etc., Co. v. Anoka, 109 Fed. Rep. 580; Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1053; Seward v. Liberty, 142 Ind. 551; 42 N. E. Rep. 39; Gaslight, etc. Co. v. New Albany, 156 Ind. 406; 59 N. E. Rep. 176.

nicipality; and it cannot be urged that they were not officers *de jure*.² The fact that a municipality is authorized to build and maintain a plant of its own does not necessarily prevent it from making a contract for light, and this is true even though in the charter authorizing the building of such a plant is bestowed no specific power to enter into a contract with a company for light. Thus a gas company's statutory charter authorized it to furnish gas to the city for which it was created; and the charter of the city only authorized it to build and maintain a gas plant; and yet it was held that the city could bind itself by a contract with the company for lighting the streets.³ In as much as entering into a contract for lighting the streets is not the exercise of legislative power, the contract need not be by formal ordinance or resolution.⁴

§408. Constitutional or statutory limitations on indebtedness.

Constitutional or statutory provisions forbidding municipalities contracting a debt beyond a certain amount or percentage of its assessable property are not uncommon, and must be considered in entering into a contract for light. If the entire amount a city will pay on a twenty years' contract for light must be considered a debt of the city when the contract is entered into,

²Lake Charles Ice, etc., Co. v. Lake Charles, 106 La. 65; 30 So. Rep. 280.

³Newport v. Newport Light Co., 11 Ky. L. Rep. 840; Indianapolis v. Indianapolis, etc., Co., *supra*.

⁴Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058.

Power in a city to furnish water to its inhabitants and control the erection of water works for that purpose, is sufficient to authorize the city to enter into a contract for water and to grant a franchise for such purpose. Anoka W. W., etc., Co. v. Anoka, 109 Fed. Rep. 580.

In New Jersey before a city can let a lighting contract it must first establish a system of street light-

ing, under a statute providing that it "shall have power to establish, publish, modify, amend, or repeal ordinances, rules or regulations, and by laws," "to provide lamps and gas fixtures, and to light the streets, parks, and public places of every description in" the city. Taylor v. Lambertville (N. J.), 10 Atl. Rep. 809.

A statute may give the courts power to reform a city's contract. Du Bois v. Du Bois, etc., Co., 176 Pa. St. 430; 35 Atl. Rep. 248; 38 W. N. C. 417; 34 L. R. A. 92.

Vote to levy tax, see Baltimore, etc., Co. v. People (Ill.), 66 N. E. Rep. 246.

then many a city is so indebted that it cannot enter into such a contract, where such constitutional or statutory provisions prevail; but where each year's supply of light is to be paid for at the end of the year, and that is to be considered the extent of the city's debt — a debt not arising until the end of the year — a very different phase of the situation is presented. These provisions are, of course, not identical in language, although the same idea runs through them. A provision of the constitution of Indiana provides that no municipal corporation "shall ever become indebted in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." A city entered into a twenty-year contract for water, the rent payable annually. The aggregate amount of rent to be paid under this contract exceeded two per centum of the assessed value of the property within the city; but an annual payment fell below that amount. The contract was held to be valid. "If the aggregate sum of all the yearly rents," said the court, "is to be taken as a debt within the meaning of the constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the vigor of the words, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume these things were known to the electors, and that they intended to foster the best interests of these instruments of local government. . . . To deny the right to procure light and water is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We cannot, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that would practically take from the inhabitants of our cities the power to supply themselves with

water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself." "It is clear that if the city," continues the court, "should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and, therefore, it cannot be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract. The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for, while there might be a liability for damages, in case of a breach on the part of the city, there is certainty none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the constitution. We are careful to say that when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of the municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished and without increasing the corporate indebtedness beyond the constitutional

limit.”⁵ The Supreme Court of Illinois has used the following language concerning a contract for gas: “The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment monthly, at the end of each month that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability — an indebtedness arises — and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of entering into the contract, within the meaning of the constitution.”⁶ But a contract for a gas plant to be leased by the city, which increases the city’s indebtedness beyond the constitutional limit is void, although merely executory;⁷ and so is a contract whereby a city agrees to pay a definite sum on the completion of water works or a gas plant.⁸ But an ordinance providing that any unexpended appropriations left

⁵ Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416; Sackett v. New Albany, 88 Ind. 473; 45 Am. Rep. 467.

⁶ East St. Louis v. East St. Louis, etc., Co., 98 Ill. 415; Dively v. Cedar Falls, 27 Ia. 227; Grant v. Davenport, 36 Ia. 396; French v. Burlington, 42 Ia. 614; Burlington Water Co. v. Woodward, 49 Ia. 58; City Water Supply Co. v. Ottumwa, 120 Fed. Rep. 309; State v. McCauley, 15 Cal. 429; People v. Pacheco, 27 Cal. 175; Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; Lamar Water, etc., Co. v. Lamar, 140 Mo. 145; 39 S. W. Rep. 768; Creston W. W. Co. v. Creston, 101 Ia. 687; 70 N. W. Rep. 739; Keihl, v. South Bend, 76 Fed. Rep. 921; 22 C. C. A. 618; 44 U. S. App.

687; 36 L. R. A. 228; Hay v. Springfield, 64 Ill. App. 671; Gold v. Peoria, 65 Ill. App. 602; Winston v. Spokane, 12 Wash. 524; 41 Pac. Rep. 888; Brown v. Corry, 175 Pa. St. 528; 34 Atl. Rep. 854 (affirming 4 Pa. Dist. Rep. 645; 17 Pa. Co. Ct. Rep. 490); State v. Quayle (Utah), 71 Pac. Rep. 1060; New Orleans Gaslight Co. v. New Orleans, 42 La. Ann. 1 18; 7 So. Rep. 559; Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77. See Appeal of City of Erie, 91 Pa. St. 398; Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058.

⁷ Spilman v. Parkersburg, 35 W. Va. 605; 14 S. E. Rep. 279.

⁸ Culbertson v. Fulton, 127 Ill. 30; 18 N. E. Rep. 781.

at the end of each year shall be used to pay for a plant purchased of a lighting company, if the city elects to purchase it; and in case of a purchase the acceptance shall create no indebtedness against it in favor of the company, is valid; for in that case there is no debt against the city.⁹ If at the time a city enters into a contract for light, to run over a long series of years, the indebtedness of such city is not so great as to prohibit it; and before it expires the debt so increases as to exceed the limit of an annual installment falling due, such installment cannot be collected from it, and the claim for it is void.¹⁰

§409. Length of term of contract.

Elsewhere, under the head of Monopolistic Grants and Monopolistic Contracts, is treated the power of a municipality to bind itself in perpetuity or for a long term of years to take gas from a gas company; and it is not necessary to repeat here what is said there. Suffice to say here, that when a statute provides that a municipality may enter into a contract for the lighting of its streets for a certain number of years, it cannot exceed the limitation thus imposed upon it. If the municipality undertakes to enter into a contract for a longer period than the statute authorizes, that fact will not, it has been held, render it invalid; but it will be valid for the time such municipi-

⁹ Hay v. Springfield, 64 Ill. App. 671.

¹⁰ Keihl v. South Bend, 76 Fed. Rep. 921; 44 U. S. App. 687; 22 C. C. A. 618; 36 L. R. A. 228.

As to waiver of a statutory provision prohibiting an indebtedness, see Bronx Gas, etc., Co. v. New York, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358.

In Georgia the rule was said to be ascertained by adding to the principal of all outstanding indebtedness the amount of all accrued interest that may be past due and payable on the day the amount of the debt is to be fixed. In ascer-

taining the amount of such debt, future interest which is not due on the day it becomes necessary to fix the sum of indebtedness is not to be counted. Unearned interest is not, within the true intent and meaning of the constitution, a part of the debt of the city. Epping v. Columbus (Ga.), 43 S. E. Rep. 803, citing Dawson v. Water Works Co., 106 Ga. 696; 32 S. E. Rep. 907; Colson v. Portland, Fed. Cas. 3275; Board v. Hopkinsville, 95 Ky. 239; 24 S. W. Rep. 872; 44 Am. St. Rep. 222; 23 L. R. A. 402; Culbertson v. Fulton, 127 Ill. 30; 18 N. E. Rep. 781; Springfield v. Edwards, 84 Ill. 626.

pality is authorized to make the contract. Thus where a municipality was empowered to enter into a contract for the furnishing of water for twenty years, and did so; but it was also provided in the contract that it should remain in full force for an additional twenty years, if the municipality did not purchase the water works before the expiration of the first term, it was held to be a valid contract for the original term of twenty years.¹¹ A statute authorizing municipal authorities to enter into a contract for water from year to year does not require them to make a new contract every year, but they may enter into one for a term of years — as for twenty years.¹² So where a city entered into a contract for twenty-one years, to furnish the city with water; and the company at great expense built water works and maintained them for four years; and the city levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of the contract; it was declared that the contract would not be held void for the reason that it exceeded the length of time allowed by statute, but it would be upheld for a reasonable time, the circumstances and condition of the city as to population and assessed valuation being substantially the same, and no other better facilities being offered upon more reasonable terms.¹³ It is no objection to the contract that the term begins in the future, or even that it does not begin until after the terms of the councilmen authorizing it has expired.¹⁴ But the proposition that a contract exceeding the term of time, has not met with favor from all the courts. Thus where a contract for twenty years was made for twenty years, instead of ten, as it should have been, in which rates were agreed upon; it was held that at the end of the first ten years the municipality would regulate the rates. *State v. Ironton Gas Co.*, 37 Ohio St. 45.

¹¹ *Neosho City Water Co. v. Neosho*, 136 Mo. 498; 38 S. W. Rep. 89; *State v. Ironton Gas Co.*, 37 Ohio St. 45.

¹² *Light, Heat, etc., Co. v. Jackson*, 73 Miss. 598; 19 So. Rep. 771.

¹³ *Columbus Water Co. v. Columbus*, 48 Kan. 99; 28 Pac. Rep. 1097.

¹⁴ *Logan Natural Gas Co. v. Chil-*

licothe, 65 Ohio St. 186; 62 N. E. Rep. 122.

Where a contract was made for twenty years, instead of ten, as it should have been, in which rates were agreed upon; it was held that at the end of the first ten years the municipality would regulate the rates. *State v. Ironton Gas Co.*, 37 Ohio St. 45.

that State, "that the municipality shall not have power to contract for any light for any term not exceeding ten years. This implies, with as much force as if it had been expressly stated, that the municipality shall not have power to contract for any longer than ten years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their non-enforcement is to prevent their attempted execution. This may not be effectually done unless they are held to be void."¹⁵ This rule has been followed in Indiana.¹⁶ In this Indiana case a contract was entered into in 1870 for gas for a period of twenty years beginning in 1871, and providing that at the end of that period the city "will either purchase from the said gas company . . . their gas works, pipes, meters and other property at the fair and reasonable value thereof at that time, or grant them the same right and privileges as contained in this ordinance for another term of not less than twenty years, but subject, however, to such other reasonable conditions as the interest of said city, and of her citizens, may at that time require." In 1883 the legislature enacted a statute prohibiting a city entering into a contract for light for a term exceeding ten years in duration; and in 1888, three years before the first twenty years' period had expired, the city entered into a contract, supposed to be in pursuance of the terms of the first ordinance noted, for gas for a term of twenty-three years. This last contract was held to come within the prohibition of the statute referred to.¹⁷ Of contracts extending over a long term of years,

¹⁵ *Wellston v. Morgan*, 59 Ohio St. 147; 52 N. E. Rep. 127.

¹⁶ *Gaslight, etc., Co. v. New Albany*, 156 Ind. 406; 59 N. E. Rep. 176. See also to the same effect *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 8 C. C. A. 140; *State v. Harrison*, 46 N. J. L. 79; *Somerset v. Smith*, 20 Ky. Law Rep. 1488; 49 S. W. Rep. 456.

¹⁷ A contract for twenty-one years was held not to be an abuse of discretion on the part of the city coun-

cil. *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 518; *Adrian W. W. v. Adrian*, 64 Mich. 584; 31 N. W. Rep. 529 (a thirty-year contract construed).

A power to enter into a contract for gas "and to cause the annual expense thereof" to be certified to a proper board, limits the power to make only one year contracts. *Taylor v. Lambertville* (N. J.), 10 Atl. Rep. 809; *Atlantic City W. W. Co.*

the Supreme Court of Indiana said: "It may be true that the contract creates an obligation for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous, for it is a matter of common knowledge that it requires a large outlay to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, in the ordinary mode in which such a thing as electric light or gas is obtained."¹⁸

§410. Extending term of contract.

The municipality may extend the term of a contract, so long as it keeps within the statutory period, and the gas company will agree to the extension; and such extension is not void on the ground that it is against public policy, where the city is authorized by the statute to light its streets. No fraud is implied in such a contract on the ground that the city cannot decrease the number of lamps during the term.¹⁹ Where a contract was for one year, entered into in 1856; and from time to time new contracts, not always in writing, were entered into, but the company continued to furnish gas and the city to pay for it according to the last written contract until a new

v. Reed, 50 N. J. L. 665; 15 Atl. Rep. 10. See Harlem Gaslight Co. v. New York, 33 N. Y. 309, affirming 3 Robt. 100.

¹⁸ Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; Foland v. Frankton, 142 Ind. 546; 41 N. E. Rep. 1031. See Edison Electric, etc., Co. v. Jacobs, 8 Kulp 120; Black v. Chester, 175

Pa. St. 101; 34 Atl. Rep. 354; Hartford v. Hartford, etc., Co., 65 Conn. 324; 32 Atl. Rep. 925; Denver v. Hubbard (Colo. App.), 68 Pac. Rep. 993; Southwest, etc., Co. v. Joplin, 113 Fed. Rep. 817.

¹⁹ Parfit v. Furguson, 38 N. Y. Supp. 466; 3 N. Y. App. Div. 176; 73 N. Y. St. Rep. 621; affirmed 159 N. Y. 111; 53 N. E. 707.

one was executed, until 1884, when the last one was executed, which expired October 1, 1885; it was held that the gas furnished for one year after the last written contract expired must be paid for according to the terms of such contract, and that a statute forbidding the city to enter into a second contract with a company for gas to be furnished while a contract was in force applied to a second contract with another company for gas during the year 1886.²⁰

§411. Bids for lighting.

Unless the provisions of the municipality's charter requires it, or some statute, the contract need not be let by advertising for bids, and if bids are advertised for, it need not be let to the lowest bidder, especially if the right to choose among the bidders is reserved.²¹ The letting of bids is a judicial act, and no action lies for damages against a board of aldermen for their failure or refusal to award to a company the contract for lighting a city.²² If a city formally reject a bid it cannot afterwards accept it and bind the bidder.²³ Specifications in an advertisements for bids, some of which are for proposals to light a city as it is lighted at the time bids are asked, while others call for light on any other plan, subject to the condition of furnishing lights of 2,000 candle power, are sufficiently definite, and need not be more explicit.²⁴ The mere fact that a bidder has put in the lowest bid does not constitute an award of the contract to him, where the statute provides that "if the lowest bidder shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, the

²⁰ Taylor v. Lambertville (N. J.), 10 Atl. Rep. 809.

²¹ Harlem Gaslight Co. v. Mayor, 33 N. Y. 309, affirming 3 Robt. 106.

²² East River Gaslight Co. v. Donnelly, 25 Hun 614; Gaslight Co. v. Donnelly, 93 N. Y. 557; People v. Gleason, 121 N. Y. 631; 25 N. E. Rep. 4.

²³ Brush Electric Light Co. v.

Cincinnati, 28 Wkly. Law Bull. 29; 27 Wkly. L. Bull. 412; 11 Ohio Dec. 581. If the city endeavors to assign the certificate of deposit accompanying the rejected bid, an injunction will lie to prevent it doing so.

²⁴ Detroit v. Hosmer, 79 Mich. 384; 44 N. W. Rep. 622.

deposit made by him shall be forfeited to the city.”²⁵ Competitive bidding need not be asked under the charter of Greater New York before entering into a contract for a supply of water to the municipality.²⁶ If a contract provides for an increase of the number of lights at a fixed price per light upon demand of the city, it is not necessary to advertise for bids concerning the extra lights.²⁷

§412. How contract executed.

As a rule there is nothing peculiar about a lighting contract with a municipality different from other contracts, aside from the right to occupy the streets with gas mains or pipes. Usually, however, these contracts, evidenced by an ordinance adopted by the common council or board of trustees, specifically setting forth the terms of the contract, requires an acceptance in writing on the part of the gas or water company. But there is nothing to prevent the ordinance being binding, although the

²⁵ *Erving v. New York City*, 131 N. Y. 133; 29 N. E. Rep. 1101, affirming 16 N. Y. Supp. 612.

In Georgia a city can make a cash contract for current supplies—such as lamps and gasoline—for lighting streets through its appropriate officers without a formal resolution entered on its minutes. *Conyers v. Kirk*, 78 Ga. 480; 3 S. E. Rep. 442.

²⁶ *Gleason v. Dalton*, 28 N. Y. App. Div. 555; 51 N. Y. Supp. 337; 85 N. Y. St. Rep. 337; reversing 23 N. Y. Misc. 18; 50 N. Y. Supp. 90.

²⁷ *Bronx Gas, etc., Co. v. New York*, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358.

As to bidding contracts and the failure to accept them, see *Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485; *Searle v. Abraham*, 73 Ia. 507; 35 N. W. Rep. 612.

An ordinance calling for bids

must be literally complied with by the city, by inserting the requisite number of notices in a newspaper calling for bids. *Taylor v. Lambertville* (N. J.), 10 Atl. Rep. 809.

The constitution of California provides that any person may use the streets of a city, under proper regulations as to damages and charges, while there is no city plant for supplying light. A statute provides that every franchise to erect poles or wires for electric lighting shall be advertised and sold to the highest bidder. In view of these provisions, it was held that the statutory requirement of advertising and sale was unconstitutional as applied to cities having no municipal plant, for the highest bidder at the sale would necessarily take an exclusive franchise, while the constitution required competition. *Pereria v. Wallace*, 129 Cal. 397; 62 Pac. Rep. 61.

company does not accept its terms in writing, if it in fact accepts its terms by acting under it; and this is true even though the ordinance provides for a written acceptance; for in such an instance the municipality waives a written acceptance by permitting the company to go on and comply with the provisions of the contract without first requiring a written acceptance. The common council or board of trustees may confer authority upon a municipal officer to execute the contract, where no positive statute prevents it; especially where it reserves the right to approve it after it is formally signed. In such an instance as the latter case the approval of the mayor is not necessary.²⁸ Under a statute that the board of street commissioners shall superintend and provide for lighting street lamps, and repair them, it has power to make a contract with a company for gas at a fixed rate, where it acts under the authority of the city council, the charter providing that it shall cause to be executed all orders of such council.²⁹

§413. Liability of city for breach of contract — damages.

If a municipality fails to keep its contract with the company contracting to supply it with gas, it is liable in damages for the

²⁸ *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *Lake Charles, etc., Co. v. Lake Charles*, 106 La. 65; 30 So. Rep. 289; *Gosport v. Prichard*, 156 Ind. 400; 59 N. E. Rep. 1058; *Logansport v. Dikeman*, 116 Ind. 15; 17 N. E. Rep. 587.

If the mayor can veto the ordinance, he must do so within the time fixed by statute. *Pennsylvania Globe Gas Co. v. Scranton*, 97 Pa. St. 538.

²⁹ *Hartford v. Hartford Electric Light Co.*, 65 Conn. 324; 32 Atl. Rep. 925.

An ordinance providing for water for a city to be furnished by a private corporation at an annual rental, payable quarterly for thirty years, is a contract for such times

as the city may request water to be furnished, the taking being optional with the city, for the purpose of determining the amount of the city's indebtedness. *Gold v. Peoria*, 65 Ill. App. 602.

An agreement by a board of improvement of a town with a gas company that such board will not give its consent to any other company to lay its pipes in the streets does not prevent other officers becoming vested with the power to determine whether leave shall be granted to other companies to lay pipes in the streets for exercising the power. *Parfitt v. Ferguson*, 150 N. Y. 111; 53 N. E. Rep. 707; affirming 38 N. Y. Supp. 466; 3 N. Y. App. Div. 176.

breach. But the company cannot recover the price of gas not furnished, although it was not its fault that the gas was not furnished. Nor is it any defense for the municipality that it is unable to pay for the gas it has contracted to take; nor can it annul the contract for that reason, much less at its own will.³⁰ For a failure to take gas the company recovers what profits it would have made under the contract during the time it was not allowed to furnish the gas, or, in other words, the difference between the cost of furnishing it and its value according to the terms of the contract.³¹ But an ordinance may be so worded that there is no contract to take any specific quantity; in which event the city will not be liable for a refusal to take gas. Thus where an ordinance gave a gas company the right to occupy the streets with its pipes and mains, providing that it should furnish "good, pure gas for all the public lamps of the city, and light, extinguish and keep them in good repair," at a fixed price per annum per lamp; and also provided that the city council should "have the right at all times to regulate the times of lighting and extinguishing the street lamps, and of determining the quantity of gas to be consumed by the city"; it was held that there was no express contract by the city, under the ordinance to take any quantity of gas; and that an action for damages could not be maintained against the city for a failure to take it.³² The action of a city does not always amount to a rescission of the contract; as where a city was to take gas, at a stated price per month, and it under-

³⁰ *Davenport Gaslight and Coke Co. v. Davenport* 13 Ia. 229; *Gosport v. Pritchard*, 156 Ind. 400.

³¹ *Davenport Gaslight and Coke Co. v. Davenport*, 15 Ia. 6.

In this case litigation having arisen between the city and company to determine the validity of the contract, it was agreed between them that the company should have the privilege of shutting off the gas from the city lamps until the question of the validity of the contract should be determined by

the courts, and that no existing right should be prejudiced or affected, but the contract should, if valid, remain to the same extent as though the company had not shut off the gas. It was held that this special agreement did not prevent the company from recovering of the city damages for the breach of the original contract, it having been declared valid.

³² *Gaslight and Coke Co. v. New Albany*, 156 Ind. 406; 59 N. E. Rep. 176.

took to rescind the contract by a resolution of the council, approved by the mayor, declaring the contract to be at an end, and notifying the company of its action. This was considered not to be a rescission of the contract, for the gas company had not assented to it; but only a breach of it, for which the company could recover from the city, in a proper action, adequate damages.³³

§414. Assignment of lighting contract.

A distinction must be borne in mind between a contract to furnish light to a city, and the grant of a right to lay pipes in its streets and maintain a lighting plant. The distinction may often seem shadowy, but it is in this way that the many seemingly conflicting cases can be reconciled. Usually lighting contracts, either in direct or indirect terms, provide that they may be assigned; and this is not uncommon with the grant of privileges to occupy the streets — a franchise as it is often called. A contract or ordinance giving the right to the contractor or grantee to assign or transfer the contract or grant is valid.³⁴ So such contracts or grants seem to be assignable in some jurisdictions without express words in relation thereto, or without a statute expressly authorizing it.³⁵ It has been said that even an exclusive franchise may be assigned.³⁶ And under a statute authorizing a city to contract with a company for a supply of water, it may agree that such company may assign the contract or sell its plant, and that the assignee or purchaser shall suc-

³³ *Nebraska City v. Nebraska City, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

³⁴ *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 34 Am. and Eng. Corp. Cas. 49; *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558; 19 Sup. Ct. Rep. 77; *Pittsburgh Carbon Co. v. Philadelphia Co.*, 130 Pa. St. 438; 18 Atl. Rep. 732.

³⁵ *San Luis Water Co. v. Estrada*,

117 Cal. 168; 48 Pac. Rep. 1075. The entire property, franchises and privileges cannot be transferred by sale or lease for the life of the corporation; and the company thus incorporated abandon its corporate duties. *New Albany W. W. v. Louisville*, 122 Fed. Rep. 776.

³⁶ *Southern Illuminating Co.*, 5 Pa. Dist. 781. But see *Brunswick Gaslight Co. v. United, etc., Co.*, 85 Me. 532; 27 Atl. Rep. 525.

ceed to all the rights of the assignor.³⁷ Where the right of assignment is given, or the assignment is acquiesced in by the city, the assignee must comply with all the terms of the original contract,³⁸ or as modified in the written consent to the assignment.³⁹ If the grant is made to the grantee, his administrator or assigns, his administrator may carry out its provisions after such grantee has died.⁴⁰

§415. Rescission of contract — breach.

Under proper circumstances a municipality may rescind its contract with a gas company to take gas from it for municipal purposes. But it must be such a breach as goes to the very substance of the contract.⁴¹ And a suit for that purpose can be brought by it.⁴² But mere inadequacy of the supply of gas is not a sufficient reason for cancelling the contract, unless a proper demand for an increase of the supply has first been made.⁴³ In the case of a contract for water, to be furnished from certain named springs, mere inadequacy of the supply, occasioned by the fact that the springs did not furnish enough water, was held to be no reason for a cancellation of the contract.⁴⁴ If the quality of the gas is not such as the contract calls for, that is not a sufficient reason for its cancellation,

³⁷ American W. W. Co. v. Farmers' Loan and Trust Co., 73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563.

³⁸ Freeport Borough v. Enterprise Natural Gas Co., 18 Pa. Super. Ct. 73; Sandy Lake v. Sandy Lake, etc., Co., 16 Pa. Super. Ct. 234; Austin v. Bartholomew, 107 Fed. Rep. 349; 46 C. C. A. 327.

³⁹ *In re Pryor*, 55 Kan. 724; 41 Pac. Rep. 958; 29 L. R. A. 398.

What is not an assignment and not a violation of a statute forbidding it, see Marlborough Gaslight Co. v. Neal, 176 Mass. 217; 44 N. E. Rep. 139.

⁴⁰ Stein v. Bienville Water Supply Co., 34 Fed. Rep. 145; affirmed

141 U. S. 67; 11 Sup. Ct. Rep. 892.

The power to make and sell gas does not imply the power to sell or assign the privilege to make and sell gas given by the company's charter. Chicago Gaslight, etc. Co. v. People's, etc., Co., 121 Ill. 530; 13 N. E. Rep. 169.

⁴¹ Light, Heat, etc., Co. v. Jackson, 73 Miss. 598; 19 So. Rep. 771.

⁴² Light, Heat, etc., Co. v. Jackson, *supra*.

⁴³ United States W. W. Co. v. Du Bois, 176 Pa. St. 439; 38 W. N. C. 419; 35 Atl. Rep. 251.

⁴⁴ Du Bois v. Du Bois City W. W. Co., 176 Pa. St. 430; 38 W. N. C. 417; 35 Atl. Rep. 248; 34 L. R. A. 92.

unless the company's attention has been called to it, a demand made for a compliance with the contract in that respect, and a failure made or neglect to comply with the demand; and especially is this true, where the quality of gas complained of has been furnished for a period of years.⁴⁵ Where the gas was to be paid at so much a light, burning from sunset to sunrise, to consume a certain number of feet per hour, an inability on the part of the company to furnish the full amount agreed upon, is not a sufficient reason for cancelling the contract, where such inability arises from frost getting into the pipes and clogging them so the gas cannot flow through them in sufficient quantities.⁴⁶

§416. Discontinuing use of gas.

A contract may be so drawn as to permit a change from the use of gas to electricity; and this is frequently done.⁴⁷ So it is not infrequent occurrence to draw it so as to authorize the discontinuance of some of the lights and the establishment of others. An instance of this kind is furnished by an Iowa case. There the contract provided a city should take gas for lighting the streets and its public buildings for ten years, but also provided that the city might discontinue the use of gas lamps in the business district after a certain time, less than ten years, and change to electric light; and also that it might discontinue the gas lamps in the other parts of the city temporarily or permanently. It was held that the city had no right to use other means to light the streets outside of the business

⁴⁵ *Winfield v. Winfield Water Co.*, 51 Kan. 70; 32 Pac. Rep. 663.

A private consumer cannot bring suit to cancel the city's contract with the gas company, for there is no privity of contract between him and the company. *Akron Water Works Co. v. Brownless*, 1 Ohio Dec. 1; 10 Ohio C. C. 620.

The company may buy gas to

supply its customers with. *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

⁴⁶ *In re Richmond Gas Co.* [1893]. 1 Q. B. 56; 62 L. J. Q. B. 172; 67 L. T. 554; 41 W. R. 41; 56 J. P.

⁴⁷ *Gaslight and Coke Co. v. New Albany*, 139 Ind. 660; 39 N. E. Rep. 462.

district than gas; and if it choose to light such streets it must take the gas from the gas company.⁴⁸

§417. Changing contract.

A municipality can no more change a lighting contract it has with a company, than can an individual change a contract with such company, unless the company agrees to such a change. Usually such contracts provide for changes, and a proportionate increase or decrease of the amount to be paid according to the changes made. Where the guaranty in a contract was that the 100 lights provided for in such contract would furnish good and sufficient light for a territory equal to that then lighted by gas, it was held that it became inoperative when a portion of the electricity necessary to supply the 100 lights was diverted from the street lights to those in the city's public buildings.⁴⁹

§418. Gas furnished not covered by contract.— No contract.

If a gas company furnishes a city gas for lights outside of its contract, then the city is liable for the amount thus supplied, regardless of the contract. "A municipality," said Justice Fields, "cannot avail itself of the property or labor of a party, and then screen itself from responsibility under the plea that it never passed an ordinance on the subject. The law implies a promise to pay in such cases."⁵⁰ If a city receives gas and uses it for lighting its streets, without any contract relative thereto, it will be liable, in an action to recover therefor, for the value of the gas supplied.⁵¹

⁴⁸ *Capitol City Gaslight Co. v. Des Moines*, 93 Ia. 547; 61 N. W. Rep. 1066; 48 Am. and Eng. Corp. Cas. 138.

⁴⁹ *Brush Electric Light, etc., Co. v. Montgomery*, 114 Ala. 433; 21 So. Rep. 960. See *Southwest, etc., Co. v. Joplin*, 113 Fed. Rep. 817.

⁵⁰ *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

⁵¹ *Harlem Gaslight Co. v. New York City*, 33 N. Y. 309, affirming

3 Robt. 100. In this case it was held that a contract fixing the price to be paid for a particular year is not in its nature an agreement running from year to year, and cannot fix the measure of compensation for subsequent use. See *Conyers v. Kirk*, 78 Ga. 480; 3 S. E. Rep. 442.

Mere delay to pay claim for extra lights furnished is not conclusive against the right of the company

§419. Municipality extending limits after making contract.

Contracts usually provide for new territory added to that of the municipality after it is entered into, or else they are usually of sufficient elasticity to provide for such additional territory. And this is true even where no contract has been made for lighting, but simply the right to occupy the streets with pipes or mains and supply private consumers has been given. In such instances the gas company may occupy the new territory without further contract or grant and collect for gas used in the street lamps.⁵² In the Missouri case was also involved the element of estoppel, because of the fact that the gas company had occupied the added territory for a long series of years. In New York it is held that the consent of the city is not confined to the streets existing at the time the consent is given, unless that be the natural reading of the consent.⁵³ And a gas company does not violate its contract with a municipality or its franchise where it delivers gas to a consumer within the city, knowing at the time the consumer will not use it until he has transported it beyond the municipal limits.⁵⁴

to pay for them. *Brush Electric Light, etc., Co. v. Montgomery*, 114 Ala. 433; 21 So. Rep. 960; but if both the city and the company thought the extra lights came under the general contract, then no pay for them up to the date that that is discovered not to be true can be claimed. *Id.*

⁵² *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Cincinnati, etc., Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527; *Des Moines v. Des Moines W. W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269; *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 App. Div. 175; 42 N. Y. Supp. 1071.

⁵³ *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 App. Div. 175; 42 N. Y. Supp. 1071. See the English case of *Huddersfield v. Ravensthorpe Urban Dis-*

trict Council [1897], 2 Ch. 121; 66 L. J. Ch. 581; reversing [1897] Ch. 652; 66 L. J. Ch. N. S. 286; 76 L. T. Rep. 377.

⁵⁴ *Lawrence v. Methuen*, 166 Mass. 206; 44 N. E. Rep. 247.

Under a Pennsylvania statute giving an exclusive franchise to a gas company, if the city limits be extended another company will not be given a franchise for the new territory. *In re Levis Water Co.*, 11 Pa. Ct. Rep. 178.

In this State a corporation was organized to supply a village with water. It accepted the provisions of the Pennsylvania constitution and the Act of April 29, 1874, and its supplements and amendments after the repeal of the exclusive privileges given to water companies by Sec. 34, clause 3, of that Act. by the Act of June 2, 1887. It was

§420. Municipality receiving light under a void contract.

If the contract between a municipality and a lighting company is void because of a lack of power on the part of the former to bind itself by the kind of a contract in which it attempted to do so, yet that will not permit the municipality to wholly escape liability to reimburse the company for the light actually furnished. Such an instance is where the municipality has attempted to give the company the right to occupy its streets, to the exclusion of all other companies. In such an instance the validity of the contract in the feature alluded to is no defense in an action to recover for the light furnished.⁵⁵ So where a city agreed to exempt a gas company from city taxation, and to pay it with money out of its sinking fund, this was held to be no defense in an action for the price agreed upon, for in that respect the city could bind itself, and the *ultra vires* provisions did not invalidate the entire contract.⁵⁶ The fact that the contract was let without due advertisement for bids is also no defense in an action to collect rents.⁵⁶ If the ordinance be void under which the gas or water is furnished, the city cannot arbitrarily pass an ordinance fixing the rates at any rate it chooses.⁵⁷

held that it could not obtain an exclusive right or privilege to supply water to the village. *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153.

⁵⁵ *Illinois Trust, etc., Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 18; *Gosport v. Pritchard*, 156 Ind. 400; 59 N. E. Rep. 1134; *Higgins v. San Diego*, 118 Cal. 524; 45 Pac. Rep. 824; 50 Pac. Rep. 670; *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Super. Ct. 234.

⁵⁶ *Nebraska City v. Nebraska City, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

⁵⁶ *Nicholasville Water Co. v. Nicholasville (Ky.)*, 18 Ky. L. Rep.

592; 36 S. W. Rep. 549; 38 S. W. Rep. 430.

⁵⁷ *Des Moines v. Des Moines W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269.

Where the ordinance was void, the price fixed in it was held not to control, but the company could recover what the gas was worth, not being limited by the amount named in the ordinance. *Elmira Gaslight Co. v. Elmira*, 2 Alb. L. Jr. 392. But the fact that that part of the grant giving an exclusive grant is void, does not disturb the price fixed upon in the contract. *East St. Louis v. East St. Louis Gaslight and Coke Co.*, 98 Ill. 415.

§421. **Contracts void for uncertainty.**

Occasionally contracts for municipal lighting are so uncertain as to be void. An illustration of this kind arose in Indiana. A city agreed with a gas company to take gas for a period of twenty-three years, and in the contract it was provided that if, at any time during the period of the contract, the city determined to substitute electric for gas lights the gas company should "make the substitution of such electric lights instead of as many street lamps as may be agreed upon between the city and the company, the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the city and the company." It was held that this contract was so uncertain that it was void, no agreement ever having been made as to what or how many gas lamps were to be removed or what should be the price of the electric lights; and so the court refused to enjoin the city from procuring electric lights by competitive bids.⁵⁸ Where the contract was to be paid, after a specified time, the "average price paid by other cities" having efficient works, and in case of a disagreement the amount should be settled by arbitration, it was held to be so impracticable, unreasonable, and indefinite that it could not be enforced.⁵⁹

§422. **Moonlight schedule.**

It is a very common part of municipality lighting contracts that no charge shall be made for light on nights when the moon furnishes a certain amount of light; and usually they give the municipality the power to furnish a schedule of the nights, or parts of nights, upon which gas is not to be furnished. These arrangements generally prevail more frequently in the smaller than in the larger cities. Where such a schedule was in force,

In *Grand Island Gas Co. v. West*, 28 Neb. 852; 45 N. W. Rep. 242, it was held that the amount could not exceed the price named in the void ordinance.

⁵⁸ *Gaslight and Coke Co. v. New*

Albany, 139 Ind. 600; 39 N. E. Rep. 462.

⁵⁹ *Des Moines v. Des Moines W. Co.*, 95 Ia. 348; 64 N. W. Rep. 269.

and it was also provided in a proviso that the city should not be liable for rent for any lamps for any night when lamps were not lighted, it was held that full force and effect must be given to the entire contract, so as to include the proviso, and that the city was not liable for the rent of lamps on moonlight nights, when the lamps were not lighted.⁶⁰

§423. The price to be paid.

Elsewhere has been discussed the price to be paid for gas as fixed by ordinance;⁶¹ and it is not necessary to again refer to the cases there cited. The municipality has the right to agree to the price to be paid by it for gas; and it is not a sufficient charge of fraud to annul such contract merely to allege that the price agreed upon was higher than private consumers paid. "The price to be paid for gas was within the discretion of the board of trustees of the town," said the Supreme Court of Indiana. "The only allegation concerning fraud is that the price for which appellee is about to contract is three times what is paid by private consumers; and for that reason the proposed contract is fraudulent. There is no allegation that the gas plant may not have to be enlarged to furnish the gas provided for in the contract; or that the plant is of sufficient capacity to furnish gas to light the town, or that any person or company will furnish the gas for less per year or per thousand feet, or that the gas to be furnished to the town under the proposed contract, is not the same quality as that furnished to private consumers, or that the board of town trustees or any one or more of them were about to enter into this contract from any improper or corrupt motives or influence."⁶²

§424. Free light.

Often the grant of a company to occupy the streets contains an agreement that the grantor shall have a certain amount of light free of charge, in consideration of the grant. Such

⁶⁰ Winfield v. Winfield Gas Co., 37 Kan. 24; 14 Pac. Rep. 499. ⁶² Seward v. Liberty, 142 Ind. 551; 42 N. E. Rep. 39.

⁶¹ See Sec.

agreements are valid, and binding even upon the assignee; and this is true even though the original resolution was not properly signed by the officers of the municipality, if the lighting company has built its works, and occupied the streets under it; and especially so is this true if it has furnished free light for several years.⁶³ But, in the same State, where a water company that had the right, under a statute, to enter upon the streets, it was held by another court that a municipal permit was unreasonable if granted on the condition that the company should supply the municipality with water and twenty-five water plugs free of charge for all time.⁶⁴ Where the contract with a natural gas company was to furnish the village gas free of charge "for all street lamps," it was held that the kind of lamps intended must be determined by the common use of the word where natural gas was used for street lighting; and as at the time the contract was executed open lights only were used, it was further held that the gas company could not require the village to use enclosed lights in order to reduce the amount of gas used.⁶⁵ In the charter of a gas corporation incorporated for a certain city was a clause requiring the company to furnish gas sufficient to supply five burners for the public streets for the first year, ten for the second, and so on, and were to complete all necessary works for the manufacture of gas by June 1, 1864. The company sued the city to recover the value of gas furnished it between the years 1864 and 1866, and it was held that the charter did not intend that the gas company should receive a compensation for the gas it was required to supply, the law did not raise an implied promise to pay for it, and that after the time appointed for the completion of the works the company should be allowed a reasonable time for the laying of gas pipes in order to supply

⁶³ *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Super. Ct. 234.

⁶⁴ *Forty Fort v. Forty Fort Water Co.*, 9 Kulp (Pa.) 241.

⁶⁵ *Saltsburg Gas Co. v. Saltsburg*, 138 Pa. St. 250; 27 W. N. C. 120;

20 Atl. Rep. 844; 10 L. R. A. 193.

the city, and the first year named in the contract should begin after such reasonable time had elapsed.⁶⁶

§425. Exemption from taxation in fixing price of gas.

While a municipality has no power to exempt a gas company from taxation, yet it may agree to pay it so much per lamp, and such an additional sum per lamp as will be equal to the taxes paid by the company. Such a method of determining the price to be paid is not an exemption from taxation.⁶⁷

§426. Cost of light, out of what fund paid.

It is often a serious question with a municipality heavily in debt whether such debts or the expense of lighting shall be first paid, or whether the money intended for the light can be seized for prior debts. An expense for light or water is regarded as a "current expense," payable out of "current revenues." "It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors."⁶⁸

§427. Appropriation for light, when necessary to validity of contract.

In some States an appropriation must first be made before a contract for lighting can be entered into by a municipality.

⁶⁶ *Virginia City Gas Co. v. Virginia City*, 3 Nev. 320.

If two companies consolidate, one of which was to furnish a certain amount of free gas, the consolidated company will be bound also to furnish it. *Charity Hospital v. New Orleans Gaslight Co.*, 40 La. Ann. 382; 4 So. Rep. 433.

⁶⁷ *Carterville Improvement, etc., Co. v. Carterville*, 89 Ga. 683; 18 S. E. Rep. 25.

⁶⁸ *Valparaiso v. Gardner*, 97 Ind.

1; 49 Am. Rep. 416; *Coy v. City Council*, 17 Ia. 1; *Coffin v. Davenport*, 26 Ia. 515; *Scott v. Davenport*, 34 Ia. 208; *Seward v. Liberty*, 142 Ind. 551; 42 N. E. Rep. 39; *Foland v. Frankton*, 142 Ind. 546; 41 N. E. Rep. 1031; *Fowler v. F. C. Austin Mfg. Co.*, 5 Ind. App. 489; 32 N. E. Rep. 596; *Laycock v. Baton Rouge*, 35 La. Ann. 475. See *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 665; 15 Atl. Rep. 10.

Whenever this is the case, a contract for lighting before such appropriation is made is void. This was held to be the case where the following statute was in force: "No executive department, officers or employee thereof shall have power to bind such city by any contract or agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void." The contract declared void under this statute was one for street lights for five years, at a certain price per light per year, payable monthly.⁶⁹ Similar results have been arrived at in other States.⁷⁰

§428. Exhaustion of appropriation as a defense.

In a suit to recover for gas furnished, it is no defense in the city to set up that the appropriation for that purpose had been exhausted, and that the debt had been incurred in excess of the amount appropriated.⁷¹

§429. Tax to pay for gas or to support gas plant.

The furnishing of light for the streets and the public places of a city or town is such a work of public character as will

⁶⁹ *Indianapolis v. Wann*, 144 Ind. 175; 42 N. E. Rep. 901; *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 663; 15 Atl. Rep. 10.

⁷⁰ *Kiichli v. Minnesota, etc., Co.*, 58 Minn. 418; 59 N. W. Rep. 1088; *Garrison v. Chicago*, 7 Biss. 480; *Superior v. Norton*, 63 Fed. Rep. 357; *Bladen v. Philadelphia*, 60 Pa. St. 464; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Jonas v. Cincinnati*, 18 Ohio 318; *Wallas v. San Jose*, 23 Cal. 180; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Niles W. Co. v. Niles*, 59 Mich. 311; 26 N. W. Rep. 525; *Atlantic City W.*

W. Co. v. Reed, 50 N. J. L. 663; 15 Atl. Rep. 10; *Pullman v. Mayor*, 49 Barb. 57. *Contra*, *Leadville, etc., Co. v. Leadville*, 9 Colo. App. 400; 49 Pac. Rep. 268.

⁷¹ *New York Mutual Gaslight Co. v. New York City*, 49 How. Pr. 227. As to necessity for an appropriation under a statute, see *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 663; 15 Atl. Rep. 10; *Taylor v. Lambertville (N. J.)*, 10 Atl. Rep. 809, and *Kiichli v. Minnesota Brush Light Co.*, 58 Minn. 418; 59 N. W. Rep. 1088.

authorize the levying of a tax for that purpose.⁷² But gas or water rents established by a municipality where it furnishes the gas or water are not taxes which may be collected by the tax collector, as other taxes are collected.⁷³ Power to levy taxes for gas or water purposes is subject to the limitation of a general statute providing that the aggregate of a municipal tax shall not exceed a certain fixed limit.⁷⁴ Usually a city may pay out of its general fund any deficiency for gas furnished, after it has exhausted its special levy for that purpose.⁷⁵

§430. Assessing cost of public lighting upon abutting property — cost of municipal plant.

Not infrequently the cost of public lighting is assessed upon private property abutting upon the territory benefited, just as the cost of improving the roadway of a street is assessed.⁷⁶ And so the cost of building a gas or water plant is often assessed upon the private property abutting upon the gas or water mains or plant; and this is considered a perfectly legitimate method of providing both for the cost of the light or of the construction of the plant. Where an Act of Congress authorized the commissioners of the District of Columbia to lay water mains whenever and wherever they deemed them necessary for public safety, comfort or health, and assess the cost upon the abutting property, notice to the property owner was deemed not necessary to support the water main tax.⁷⁷ So where a statute empowered a city to construct and establish gas works, or to

⁷² *Bronx Gas, etc., Co. v. New York City*, 17 N. Y. Misc. 433; 41 N. Y. Supp. 358; *Fellows v. Walker*, 39 Fed. Rep. 651 (a case of natural gas).

⁷³ *Dixon v. Enriken*, 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. 414.

⁷⁴ *People v. Lake Erie, etc., R. R. Co.*, 167 Ill. 283; 47 N. E. Rep. 518.

The fact that a city had levied for several years a tax in excess of the maximum limit to pay for gas furnished it under a contract

will not justify its conduct in refusing to levy the legal amount for such purposes for a subsequent year. *State v. Kearney*, 49 Neb. 337; 70 N. W. Rep. 255; 49 Neb. 325; 68 N. W. Rep. 533.

⁷⁵ *Creston W. W. Co. v. Creston*, 101 Ia. 687; 70 N. W. Rep. 739.

⁷⁶ *People v. Lake Erie, etc., Co.*, 167 Ill. 283; 47 N. E. Rep. 518.

⁷⁷ *Parsons v. District of Columbia*, 170 U. S. 45; 18 Sup. Ct. Rep. 521.

regulate a private establishment, and to provide by ordinance what part of the expense of lighting the street should be paid by the owners of lots fronting thereon, and in what manner the cost should be assessed and collected; and according to another section, upon petition of a certain number of lot owners within a given distance fronting on a street for lighting such streets according to the city's general plan of improvements such city might cause such part of the street to be lighted, the cost of which should be estimated according to the length of the street lighted, per running foot; it was held that the abutting property was liable, under a proper ordinance, not only for the general gas plant by the city, but for the street fixtures, such as pipes and lamp-posts, the assessment being according to the running foot and not according to the assessed value.⁷⁸

§431. Mandamus to compel auditing or payment of bills.

If a city has a board of audit or of supervisors charged by law with the duty of auditing bills, mandamus lies to compel such board to pass upon a bill for gas furnished, but the court does not necessarily require the board to allow the account. In allowing or rejecting the bill it has a discretion either to allow or reject it, and the court cannot in this respect control their action, though it may compel it to pass upon the bill.⁷⁹ But where an auditing board is not provided for, the company may sue direct for the amount due, and is not compelled to resort to a writ of mandamus.⁸⁰

§432. Action to recover for gas supplied.

Under a contract or ordinance to supply gas at a certain price, the gas company may recover from a city for all the gas it has furnished under the contract, in an action based on the contract or ordinance.⁸¹ In such an action, bills for gas furnished dur-

⁷⁸ *Nelson v. La Porte*, 33 Ind. 258.

⁷⁹ *People v. San Francisco*, 11 Cal. 42. See *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; 1 Hun 433.

⁸⁰ *Gosport v. Pritchard*, 156 Ind. 400; 59 N. E. Rep. 1058.

⁸¹ *London Gaslight Co. v. Vestry of Chelsea*, 8 C. B. (N. S.) 215; 9 Gas J. 292.

ing the months immediately preceding the months sued for under the same contract, and approved by the city council, were held admissible to show the number of lamps lighted, and that the city recognized the validity of the contract under which it was furnished, and its liability to pay for it.⁸² It is no defense that the gas works have become a nuisance, especially where no steps to have them declared a nuisance have been taken; and the city must pay for the gas it has received.⁸³ The company has a right to sue for the gas furnished, and is not compelled to resort to a writ of mandamus to compel the city to carry out the contract; even though the gas was to be paid with by the issuance of city warrants that did not fall due for several months after they were to be issued.⁸⁴

§433. Interest.

A gas company is entitled to recover interest on its bills past due; such bills coming within the general interest laws of the State.⁸⁵

§434. Lamps — posts.

Where the word "lamps" is used in a contract to light a city with natural gas, the contract contemplates such lamps as are commonly used in the natural gas region; and where only open lamps were used in a region where the gas was to be furnished, it was held that the city could not be compelled to use closed lamps, in order to lessen the consumption of gas.⁸⁶

⁸² Davenport Gaslight Co. v. Davenport, 13 Ia. 229.

⁸³ Davenport Gaslight Co. v. Davenport, *supra*.

⁸⁴ Gosport v. Pritchard, 156 Ind. 400; 59 N. E. Rep. 1058.

If the proper municipal authority has passed upon and allowed the bill, its action is final so far as the city is concerned. Metropolitan Gaslight Co. v. Mayor, 4 N. Y. Weekly Dig. 82.

In a suit for the price of gas furnished under a contract, the record of the city engineer and register of the gas inspector was held to be competent evidence. St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495.

⁸⁵ Neosho City Water Co. v. Neosho, 136 Mo. 498; 38 S. W. Rep. 89.

⁸⁶ Saltsburg Gas Co. v. Saltsburg, 138 Pa. St. 250; 20 Atl. Rep. 844; 10 L. R. A. 193.

The word "public posts" used in a contract for a supply of gas to the city, includes posts used and erected for the benefit of the public, as well as those actually owned by the city.⁸⁷ Posts put up by the company to light the streets belong to it; and it may maintain an action of trespass for an injury to them. But if the injury, in case it is charged to have occurred by negligence, is occasioned by the bad condition of the street, without fault of the defendant, then the defendant is not liable; for the relation between the city and the company is such that whatever would have been a good defense against the city, in case the post belonged to it, would be a good defense against the gas company.⁸⁸ Where it would require the laying of one mile of mains to put up six lamp-posts the city was demanding the court refused to compel the company to set them up, although a statute required the company to maintain lamp-posts "in such places or positions as shall be required from time to time by the local board for the purpose of lighting in a proper and effectual manner any street."⁸⁹ Upon the expiration of its contract with a city to furnish it light, the gas company must remove its lamp-posts from the streets—the right conferred on it, even by its charter, to lay mains in the streets not implying that erecting lamp-posts on the streets and retaining them there indefinitely if it ceases to furnish gas and its contract with the city has expired.⁹⁰

§435. United States revenue tax.

In Missouri it was held that a gas company was authorized to charge against a city consuming gas the tax imposed by the United States upon illuminating gas;⁹¹ but where a company had contracted to furnish a municipality with gas "free of

⁸⁷ *Davenport Gaslight and Coke Co. v. Davenport*, 13 Ia. 229.

⁸⁸ *Roche v. Milwaukee Gaslight Co.*, 5 Wis. 55. See *Crystal Palace Gas Co. v. Idris*, 82 L. T. 200; 64 J. P. 452.

⁸⁹ *Worksop v. Worksop Gas Co.*, 22 Gas. J. 96.

⁹⁰ *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474; 4 So. Rep. 215.

⁹¹ *St. Louis Gaslight Co. v. St. Louis*, 86 Mo. 495, affirming 11 Mo. App. 55.

charge," it was held that it could not recover the amount of the tax imposed under the Internal Revenue Act; even though the Act authorized the company to add such tax to the contract price of gas which had been previously contracted.⁹²

§436. Waiver as to quality of gas or light.

There is no doubt that a city may waive its right to defend, when sued for gas supplied it, on the ground that the quality of the gas was not up to contract, the same as it may waive its right to defend when sued for water furnished it, on the ground that the water was impure. Thus a usage of the water for a year without objection was held to be a waiver of the right to defend on the ground that it was impure.⁹³ And even though the city does object, yet accepts the water furnished as a substantial compliance with the contract, under the honest belief that such acceptance is for the best interest of the city, it cannot set up as a defense, when sued for the price, that the water was impure.⁹⁴

§437. Extending mains, failure to pay for light.

It is as much the duty of a city or a town to promptly pay the gas company's bills for light as it is that of a private citizen; and if it does not the company is not compelled to extend its mains and erect new gas posts, as it had agreed to do, upon demand of the municipal authorities, to supply gas for lights not then in use.⁹⁵

§438. Receiver bound by contract.

A receiver of a company is bound by such company's contract with the municipality for gas, so long as he continues to fur-

⁹² *Pittsburg Gas Co. v. Pittsburg*, 101 U. S. 219.

It has been held that the express companies could add to its charge for transportation the amount required to be paid in stamps by the Internal Revenue Act of 1898 upon each article.

⁹³ *Lamar Water, etc., Co. v. La-*

mar, 140 Mo. 145; 39 S. W. Rep. 768.

⁹⁴ *Creston W. W. Co. v. Creston*, 101 Ia. 687; 70 N. W. Rep. 739, citing *Philadelphia v. Hays*, 93 Pa. St. 72, and *Winfield Water Co. v. Winfield*, 51 Kan. 70; 32 Pac. Rep. 663.

⁹⁵ *Pensacola Gas Co. v. Pensacola*, 33 Fla. 322; 14 So. Rep. 826.

nish it; and he is also bound by the rates fixed in it to be charged private consumers.⁹⁶

§439. Municipal officer interested in contract.

Statutes frequently, if not universally, forbid municipal officers to have any interest in municipal contracts; and if they have, generally declare such contracts void, either in direct terms or by construction. In a case in Nebraska where the secretary and treasurer of a corporation was also a member of the city council, the contract of the corporation to light the streets of the city was held void; and it was also held that any taxpayer of the city could maintain a suit to have it cancelled; but for light actually furnished under it, the city must pay what it was actually worth, not to exceed the contract price.⁹⁷ And the same result was reached where a majority of the members of the city council were stockholders in a water company supplying the city with water.⁹⁸ The rule in some instances, however, has been relaxed. Thus where a company received its charter direct from the legislature, compelling it to furnish light to all customers of a certain city who desired it, it was held that the city must pay for light received under a contract with the company, although the mayor of the city was president of and a stockholder in it. The charter made all contracts with the city void in which a city officer had an interest; but the court considered that this particular contract was not void for the reason that it was one created by the charter and not by the parties to it.⁹⁹ Where a statute forbade a city officer to have an interest in a contract of the city, the taking of stock

⁹⁶ *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 16 U. S. App. 588; *Manhattan Trust Co. v. Dayton Natural Gas Co.*, 55 Fed. Rep. 181.

A suit by a receiver appointed by a Federal court for rentals due for hydrants, can be brought in the United States courts. *Keihl v. South Bend*, 44 U. S. App. 687;

22 C. C. A. 618; 76 Fed. Rep. 921; 36 L. R. A. 228.

⁹⁷ *Grand Island Gas Co. v. West*, 28 Neb. 852; 45 N. W. Rep. 242.

⁹⁸ *Milford v. Milford Water Co.*, 124 Pa. 610; 17 Atl. Rep. 185.

⁹⁹ *Capital Gas Co. v. Young*, 109 Cal. 140; 41 Pac. Rep. 869; 29 L. R. A. 463.

by its mayor after the contract had been let, in a company that succeeded the company obtaining such contract, and before such succession took place, did not render the contract void.¹⁰⁰ But the holding of a single share of stock by a city councilman in a company applying for a contract is a violation of such a statute.¹⁰¹

¹⁰⁰ *State v. Great Falls*, 19 Mont. 518; 49 Pac. Rep. 15.

¹⁰¹ *Foster v. Cape May*, 60 N. J. L. 78; 36 Atl. Rep. 1089.

CHAPTER XXII.

MONOPOLISTIC GRANTS AND CONTRACTS.

- §440. Division of subject.
 - §441. Legislature may authorize monopolistic grants.
 - §442. Same continued.— Pennsylvania.
 - §443. Same continued.
 - §444. Statute authorizing exclusive grant.
 - §445. A grant to use of streets to exclusion of all others must rest on statutory power.
 - §446. Grant of exclusive franchise strictly construed.
 - §447. Legislature cannot revoke monopolistic clause of company's charter.
 - §448. Municipality agreeing not to compete with gas company.
 - §449. Legislature may not authorize monopolistic grants.
 - §450. Estoppel to contest validity of monopolistic grant, ratification.
 - §451. A federal question.
 - §452. Monopolistic clause does not avoid whole contract.
 - §453. Enjoining passage of ordinance.
 - §454. Forfeiture of exclusive franchise.
 - §455. Exclusive franchise for artificial gas does not exclude natural gas.
 - §456. Extension of time for completion of work.— Additional requirements.
 - §457. Gas works built under void grant or franchise.
 - §458. Municipality's right to purchase existing works is optional.
 - §459. Unlawful combinations between gas companies.
 - §460. Granting privilege to use streets does not require a general ordinance.— General ordinance regulating streets.
 - §461. Contracts for light, length of term.
 - §462. Dating contract ahead.
- §440. Division of subject.

The subject of this chapter is divisible into two branches: one, concerning the grant of the use of the streets of a municipality to a gas company wherein it is agreed that it shall have possession of the streets to the exclusion of all other gas or lighting companies, either in perpetuity or for a designated number of years; second, concerning contracts with gas companies for lighting either in perpetuity, or for a long term of

years. This description must constantly be borne in mind, or confusion will arise in examining the cases. Electric lighting cases, water company cases and street railway cases are, of course, cases analogous to those of gas, and can properly be used in this discussion. In discussing the question, it must be borne in mind that in some States constitutional provisions forbid the granting of exclusive privileges to individuals and corporations; and where such provisions do not exist, some of the cases are made to turn upon the fact, that the legislature has not empowered the municipality to grant such exclusive privileges.*¹

§441. Legislature may authorize monopolistic grants.

The cases are not uniform upon the power of the legislature to make or authorize the making of monopolistic grants or contracts. One of the leading cases arose in Wisconsin. In that State the legislature granted to a company the exclusive privilege to manufacture and supply gas to the city of Milwaukee and its inhabitants; and this Act was upheld, the court saying: "It is claimed, or rather suggested, that even the legislature could not confer this exclusive right upon the defendant to manufacture and sell gas in the city of Milwaukee. But we are not aware of any constitutional principle which is violated by the legislature granting such an exclusive franchise. It is true that it may create a monopoly, prevent anything like a free and healthy competition in the supply of gas to consumers, and thus operate to the detriment of the public. But suppose this is all conceded; upon what ground can the court say such legislation is unconstitutional? Of course, the whole mat-

¹ Beinville Water Supply Co. v. Mobile, 186 U. S. 212; 22 Sup. Ct. Rep. 820, affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

*¹ There are some things that by their construction are necessarily exclusive. Thus a grant to a street railway to occupy a certain street necessarily excludes all other street

railways if it is a narrow street. and usually if it is a wide one. A monopolistic grant of that character is not meant by the use of the term as used in this discussion. Indianapolis, etc., R. R. Co. v. Citizens' Street R. R. Co., 127 Ind. 369; 24 N. E. Rep. 1054; 8 L. R. A. 539; 26 N. E. Rep. 893.

ter, under our constitution, is under the control of the legislature, which can take from the defendant this exclusive privilege whenever it sees-fit to do so. The public concern, in having some competition in the supply of gas, is by no means without a remedy. It can appeal to the legislature to withdraw this exclusive right which it has conferred upon the defendant. And it is but fair to assume, that whenever the monopoly becomes oppressive, the legislature will repeal the special privilege it has granted. At all events, it is sufficient to say that the remedy is with the legislature, which has ample authority to do what may be for the best interests of the citizens of Milwaukee." ² This decision is made to rest upon the theory that the legislature can revoke that part of the company's charter giving it an exclusive franchise; but this claim has not been upheld by the Supreme Court of the United States, as we shall see in the next section. The case can, therefore, be regarded as one of doubtful authority. In Tennessee, whose constitution forbids the granting of "perpetuities and monopolies," a grant of the exclusive use of the streets of a city is held not to be a monopoly, and so not forbidden.³ So in New Jersey, without any special statute to that effect, a city's contract with a company to supply it with water so long as the company complied with the obligations of the contract, was upheld.⁴ A case arose in Connecticut somewhat at variance with the case already cited at length from that State. The city of Bridgeport entered into an agreement with a water works company, giving it the exclusive right to lay pipes in its streets so long as it furnished a full supply of fresh water. The assignee of this agreement expended a large sum of money in putting in water works; and this assignee was authorized by a special Act of the legislature to acquire all the right of the assignor, "including the right to the sole and exclusive use of the public streets," etc., "for the purpose of laying pipes therein to con-

² *State v. Milwaukee Gaslight Co.*, 29 Wis. 454; 9 Am. Rep. 598.

³ *Memphis v. Memphis Water Co.*, 5 Heisk. 405. See *Broadway, etc.*,

Co. v. Hankey, 31 Md. 346, as to a wharf.

⁴ *Atlantic City W. W. Co. v. Atlantic City*, 48 N. J. L. 378; 6 Atl. Rep. 24.

duct water into and about said city." Thirty years afterward the legislature gave another company the right to lay pipes and supply water to the same city; and it was held, conceding that the city had no power in the first place to grant an exclusive right, that the legislature having subsequently recognized this claim of power and authorized the assignee to acquire, by assignment, such exclusive right, and the assignee having accepted the provisions of the statute and performed what was required of it, there was a contract existing between it and the city which the legislature could not revoke or impair so long as the assignee supplied the city with abundance of pure water; and that the second grant was an impairment of that contract. It was so held, although a provision in the first charter reserved to the legislature the power to recall the franchise at its pleasure, which, it was said, did not authorize the legislature to impair the contract which the city had entered into for the exclusive use of its streets so long as it should supply the city with water.⁵ Some other cases uphold the power of the legislature to create gas or water companies, and endow them with monopolistic franchises, or to authorize municipalities to make such grants.⁶

⁵ *Citizens' Water Co. v. Bridgeport, etc., Co.*, 55 Conn. 1; 10 Atl. Rep. 170.

⁶ *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138. (In this Louisiana case it was held that the company entitled to the monopoly might enjoin another company denying its right, on the ground that it was a slander on its title.) *St. Louis v. Gaslight Co.*, 5 Mo. App. 484; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Des Moines St. R. R. Co. v. Des Moines, etc., Co.*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. 602. (In this Iowa case there was no statute specifically authorizing the company to make the contract.) *Memphis v. Memphis Water Co.*, 5 Heisk. 495; *Bartholomew v. Austin*,

85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568; *Newport v. Newport Light Co.*, 84 Ky. 166; *Louisville v. Wible*, 84 Ky. 290; 1 S. W. Rep. 605; *Des Moines Gas Co. v. Des Moines*, 44 Ia. 505; *Montgomery Gas Co. v. Montgomery*, 87 Ala. 245; 6 So. Rep. 113; 4 L. R. A. 616; *Des Moines St. Ry. Co. v. Des Moines*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602; *Jackson County Horse Ry. Co. v. Interstate Rapid Transit R. R. Co.*, 24 Fed. Rep. 306; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153; *Lancaster Gas and Fuel Co. v. Lancaster Gas Co.*, 17 Pa. Co. Ct. Rep. 453; *In re Light and Fuel Co.*, 17 Pa. Co. Ct.

§442. Same continued.— Pennsylvania.

The Pennsylvania Corporation Act of April 29, 1874, gives to water companies the right to introduce into boroughs and cities, wherever they may be located, a sufficient supply of pure water; and when completed, its right in the locality by its works is exclusive, until, during a period of five years, the company has divided among its stockholders a dividend equal to eight per cent upon its capital stock. Then it is made lawful, after twenty years from the introduction of the water, for the municipality to become the owner of the water works, by paying the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per cent per annum, deducting from the interest the dividends theretofore declared. An Act of May 23, 1874, passed at the same session of the legislature as the previous Act, provided that cities of the third class, should have power in their corporate capacity, to "supply with water the city and such persons, partnerships and corporations therein as may desire the same, at such price as may be agreed upon and for that purpose have at all times the unrestricted right to make and erect all proper works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, or to make contracts with, and authorizing any person, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, recep-

Rep. 113; 4 Pa. Dist. Rep. 668; *In re Lancaster Gas Co.*, 5 Pa. Dist. Rep. 244; *In re Williamsport Gas Co.*, 17 Pa. Co. Ct. Rep. 456; 2 Lack. L. News 112; 5 Pa. Dist. Rep. 251; *In re Pittsburg, etc., Co.*, 16 Pa. Co. Ct. Rep. 433; *Gas and Water Co. v. Dowington*, 175 Pa. St. 341; 38 W. N. C. 376; 34 Atl. Rep. 799; *District of Columbia v. Washington Gaslight Co.*, 20 D. C. 39; *Suburban Electric, etc., Co. v. East Orange (N. J.)*, 41 Atl. Rep. 865; *Freeport W. W. Co. v. Pragen*, 3

Pa. Ct. Rep. 371; *Tyrone Gas and Water Co. v. Tyrone*, 195 Pa. St. 566; 46 Atl. Rep. 134; *Atlantic Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367.

In Atlantic City Water Works Co. v. Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. Rep. 581, an act giving an exclusive franchise to a water company to supply Atlantic City was held void, for the reason that it was special or private legislation, a kind of legislation forbidden by the State constitution.

tion, conveyance and distribution of water, and give such persons, company or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years." It was held that there was such a repugnancy between the two Acts that both systems of water works could not be in operation at the same time; and if the city had first authorized a private company to put in water works it could not, within the ten years' period build water works for itself. It was considered, in effect, that there was only one thing to be granted, namely, the right to supply the city with water, and when that was granted the power was exhausted for the city to make a grant, as it were, to itself, or rather assume the right to erect and maintain water works, when it had already granted away that right. If the city desired to supply its citizens with water, it must purchase the company's works.⁷ Several rulings of the

⁷ *White v. Meadville*, 177 Pa. St. 643; 27 Pitts. L. J. (N. S.) 97; 39 W. N. C. 102; 35 Atl. Rep. 695; 34 L. R. A. 567; *Metzger v. Beaver Falls*, 178 Pa. St. 1; 39 W. N. C. 108; 27 Pitts. L. J. (N. S.) 102; 35 Atl. Rep. 1134 (overruling *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515); *In re Millvale Borough*, 162 Pa. St. 374; 29 Atl. Rep. 641, 644; *Wilson v. Rochester*, 180 Pa. St. 509; 38 Atl. Rep. 136.

Where the controversy was between two rival companies for the same territory, an act repealing the clause giving an exclusive franchise was upheld. *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. St. 568; 24 Atl. Rep. 117.

The exclusive territorial franchise acquired by a gas company under the Pennsylvania Act of April 29, 1874, was not repealed by the Act of June 24, 1895, of that State. *Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781. *Contra*, *Consolidated Gas Co. v. Mitchell*, 1 Dauph. Co. Rep. 71. An exclusive franchise may be sold to another company.

Southern Illuminating Co., 5 Pa. Dist. Rep. 781.

Under the Pennsylvania Act of June 2, 1887, an exclusive franchise can be granted to a gas company only when incorporated for the manufacture of gas for light alone. *Charters of Gas Companies*, 5 Pa. Dist. Rep. 396; 18 Pa. Co. Ct. Rep. 136. *Contra*, *in re Philadelphia Gas Works Co.*, 1 Dauph. Co. Rep. 55.

This statute was held to not apply where, from the nature of the case, an exclusive right cannot in fact be obtained, and the only effect would be to prevent competition throughout a large city for the benefit not only of the company claiming the privileges, but of the two other companies owned by the same persons and doing a much more extensive business, under circumstances which made it much more advantageous and easy for such company to fail to divide 8 per cent per annum for an indefinite period. *Consolidated Gas Co. v. Mitchell*, 1 Dauph. Co. Rep.

executive department of that State have been made concerning this statute in the granting of franchises. Thus the exclusive franchise expires when the company has for five years declared a dividend equal to eight per cent upon its capital stock, although the earnings have been largely applied to betterments for which the stock dividends have been issued, until the original capital has been doubled.⁸ The exclusive franchise only embraces the territory described in the application for it, and cannot include "the districts adjacent" to a city, although embraced in the application. The exclusive franchise must be for the city (or a certain named portion of it) in which the company applies for a franchise, and it can embrace no more territory than is occupied by a single city, nor can "elastic territory" be embraced in the grant. A case of doubt as to an exclusive franchise should be resolved against the corporation.⁹ The executive department holds that the consent of a corporation already in existence and having an exclusive franchise cannot authorize the granting of the same franchise to another corporation in the same district.¹⁰ When application is made for a franchise covering a territory covered by a previous franchise, it must be shown that the company first granted a franchise has never perfected it.¹¹

71. For other cases, see *People's Natural Gas Co. v. Pittsburgh*, 1 Penn. C. C. Rep. 311; *Appeal of Meadville Fuel Gas Co. (Pa.)*, 4 Atl. Rep. 733, reversing 1 Penn. C. C. Rep. 448; *Lancaster Gaslight and Fuel Co. v. Lancaster Gas Co.*, 17 Pa. Co. Ct. Rep. 453; *In re Light and Fuel Co.*, 17 Pa. Co. Ct. Rep. 113; 4 Pa. Dist. Rep. 668; *In re Charter Lancaster Gas Co.*, 5 Pa. Dist. Rep. 244; *In re Williamsport Gas Co.*, 17 Pa. Co. Ct. Rep. 456; 2 Lack. L. News 112; 5 Pa. Dist. Rep. 251; *In re Pittsburg Illuminating Gas Co.*, 16 Pa. Co. Ct. 433; *In re Levis Water Co.*, 11 Pa. Co. Ct. Rep. 178; *Rienker v. Lancaster*, 14 Lanc. L. Rev. 393; *Centre Hall Water Co. v. Centre Hall*, 186 Pa.

St. 74; 40 Atl. Rep. 153; *Carlisle Gas and Water Co. v. Carlisle Water Co.*, 182 Pa. St. 17; 37 Atl. Rep. 821.

⁸ *Citizens' Water Co.'s Charter*, 6 Pa. Dist. Rep. 80.

⁹ *New Castle Water Co. v. West New Castle Water Co.*, 6 Pa. Dist. Rep. 10; 18 Pa. Co. Ct. 498; *New Gaslight Co.*, 7 Pa. Dist. Rep. 151; 1 Dauph. Co. Rep. 22.

¹⁰ *In re Philadelphia Gas Works Co.*, 1 Dauph. Co. Rep. 55.

¹¹ *South Side Gas Co. v. Southern Illuminating Co.*, 18 Pa. Co. Ct. 529; *Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781.

See generally, *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74; 40 Atl. Rep. 153.

§443. Same continued.

A statute gave a gas company the exclusive right to supply a certain city with gas for twenty years, giving to the city the right to purchase the gas works in either twenty or twenty-five years, viz., in 1860 or 1865, under certain conditions, with promise that if the city did not purchase at either of these dates the charter should continue in force until 1890. In 1846 the city agreed to give up its right to purchase the works in 1860, the company agreeing, without the consent of its stockholders, that if the city should not buy in 1865 it might do so in 1870, or at the end of any five years thereafter. In 1860 the city desired to purchase the works, but the company declined because of the contract of 1846. In 1870 the city again took steps to purchase, but the company resisted it, now alleging that the contract of 1846 was void, and therefore the time fixed by the charter had expired. In 1873 another contract was entered into by both the city and the company and a second gas company, by which it was agreed that the contract of 1846 should be cancelled, all pending litigation dismissed, and the first company should release its exclusive right in a certain portion of the city, besides other provisions immaterial here. It was held that the right conferred upon the city to purchase the works was simply a privilege to become a purchaser in 1860 and 1865, laying the city under no obligation to do so at either of these times; that the gas company was estopped to set up the contract of 1846 as *ultra vires*; and that the contract of 1873 was not *ultra vires* on the part of the company as an attempt on its part to absolve itself from the performance of a corporate duty, that of furnishing gas to a portion of the city, for the right to exclude competition was solely for the benefit of the company, and therefore one it might surrender.¹²

¹² St. Louis v. St. Louis Gaslight Co., 70 Mo. 69 reversing 5 Mo. App. 484.

Under the original contract it was held with reference to this same

company that if the area of the city was enlarged, the exclusive grant followed into the new area. St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121.

§444. Statute authorizing exclusive grant.

In Connecticut a statute authorized in direct terms a gas company to lay its pipes in the streets of a certain town, to the exclusion of all other gas companies. No duty of supplying the public with gas was imposed. This statute was held void, and so was an ordinance of the same tenor. The court referred to those instances where the crown granted franchises to build bridges or maintain ferries and collect tolls for their use, and said that unless the grants required the grantees to serve the public, they were void for lack of consideration, and then said: "It is the duty as well as the prerogative of the government to provide necessary and convenient roads and bridges; and, to enable it to accomplish this object, it has everywhere what is called 'the right of eminent domain'; the right over individual estates to resume them for this and other public purposes. Such a prerogative connected with a corresponding duty, with the power to execute it by the exercise of the right of eminent domain, necessarily implies that it belongs to the government to determine what improvements are of sufficient importance to justify the exercise of the right, and when and how it shall be exercised; and if a particular bridge or ferry is considered sufficient for a particular locality, it may stipulate that within such reasonable limits the particular bridge or ferry tolls shall not be diminished by any other improvements of the sort. But it is no part of the duty of the government to provide the community with lights in their dwellings any more than it is to provide them with the dwellings themselves or any part of the necessaries or luxuries which may be deemed important to the comfort or convenience of the community. And if it be assured that there could be no impropriety in the lighting of the streets under the control and directions of the sovereign power, this would be merely as a regulation of public power or an incident to the duty to provide safe and convenient ways. And in case the power to provide for lighting the streets is of no importance, because nothing was done to secure the object, unless the plaintiff chose to assume it; and whether they would do so, would probably depend upon whether it could be made profitable.

As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business for manufacturing and selling gas is an ordinary business, like the manufacture of leather or any other article of trade, in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiff from using the streets for the purpose of distributing gas by means of pipes can fairly be view as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grant, and it does not require even the aid which may be derived from the Bill of Rights, which declares 'that no men or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void. . . . While, then, we are not called upon to question the power and authority of the legislature to grant to the plaintiff the right to lay down their own pipes for the distribution of gas through the streets for their own private purposes, we think, considering that the streets, subject to the public easement, are private property, that it does not possess the power to exclude others from using them for similar purposes."¹³

§445. A grant to use of streets to exclusion of all others must rest on statutory power.

In Indiana a statute gave towns absolute control over its streets. A subsequent statute provided that a town should have the "power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within" its limits, "and to require persons or companies to whom the privilege of using the streets and alleys . . . is granted for the supply and distribution of such gas to pay reasonable license for such franchise and privilege." The trustees of a town of that State granted a natural

¹³ *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19.

gas company the exclusive privilege of laying pipes and mains in the streets and alleys of their town for the purpose of supplying it and its inhabitants with natural gas; and in consideration of this grant the company agreed to furnish natural gas to each alternate street lamp free, and also to furnish gas for lights in front of the church buildings of the town without charge. The grantee of these privileges accepted them and laid its pipes and mains in the street. Thereafter another gas company, without any permit from the town, on the assumption that the grant was void, entered upon its streets and began digging trenches therein and laying pipes. The town brought an action to enjoin them, on the theory that the grant given the first company excluded all other companies. The court held that without permission of the town board of trustees the second company could not lay its pipes in the streets, and for that reason alone it should be enjoined; and that it was not precluded by its illegal grant to the first company. The court also held that inasmuch as the legislature had not empowered the town to grant an exclusive franchise, or one excluding all other companies than the grantee — it had no power to make such a grant. But the discussion of the question ran farther than this. "A municipal corporation," said the court, "cannot grant to any fuel or gas supply company a monopoly of its streets. There is nothing in the nature of the business of such a company making its use of the streets necessarily exclusive. The spirit and policy of the law forbid municipal corporations from creating monopolies, by favoring one corporation to the exclusion of others. It is probably true that a municipal corporation may make a contract with a gas company for supplying light to the public lamps for a limited time, even though it be for a number of years; on this point, however, there is some conflict, but there is no conflict on the proposition that, in the absence of express legislative authority, a municipal corporation cannot grant to any corporation the exclusive privilege of using its streets. There is, we know, much conflict among the authorities upon the question of the power of the legislature to grant an exclusive right to a gas company to use the highways of a municipal

corporation; and, under our constitution, it is very doubtful whether the legislature possesses such authority. But we are not here concerned with that phase of the question, since the legislature has not attempted to vest an exclusive privilege in any corporation."¹⁴ Some of the courts, however, go very far in upholding grants of this kind, under the general statute

¹⁴ *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; 16 S. E. Rep. 624; 20 Am. and Eng. Corp. Cas. 263; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; *Indpls. Cable St. R. R. Co. v. Citizens' Street R. R. Co.*, 127 Ind. 369; 24 N. E. Rep. 1054; 26 N. E. Rep. 893; 8 L. R. A. 539; *Crowder v. Sullivan*, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; 28 N. E. Rep. 853; 15 L. R. A. 321; 43 Am. and Eng. Corp. Cas. 483; *Westfield Gas, etc., Co. v. Mendenhall*, 142 Ind. 538; 41 N. E. Rep. 1033; *State v. St. Louis*, 145 Mo. 551; 46 S. W. Rep. 981; *State v. Cincinnati Gaslight and Coke Co.*, 18 Ohio St. 262; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; 16 Am. and Eng. Corp. Cas. 562; *Garrison v. Chicago*, 7 Biss. 480; *Jackson County Horse Co. v. Inter-State, etc., Co.*, 24 Fed. Rep. 306; *Atchison Street Ry. Co. v. Missouri Pacific Ry. Co.*, 31 Kan. 600; 3 Pac. Rep. 284; *Davis v. Mayor*, 14 N. Y. 506; 67 Am. Dec. 186; *Illinois, etc., Co. v. St. Louis*, 2 Dill. 70; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314; *Hamilton v. Hamilton Gaslight and Coke Co.*, 11 Ohio Dec. 513; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Capital City, etc., Co. v. Talahassee*, 42 Fla. 462; 28 So. Rep. 810; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; 68 S. W. Rep. 761.

The following are some instances of grants of exclusive franchises or monopolistic contracts or grants: *Logan v. Pyne*, 43 Iowa 524; 22 Am. Rep. 261 (an omnibus line, not upheld); *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80 (a market house, void); *Montjoy v. Pillow*, 64 Miss. 705; 2 So. Rep. 108; *Louisville v. Wible*, 84 Ky. 290; 1 S. W. Rep. 605 (removing the dead animals of a city, five years' contract sustained); *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196 (slaughtering animals for city's use, void); *Le Claire v. Davenport*, 13 Ia. 210 (a market, sustained), overruling *Davenport v. Kelly*, 7 Ia. 102; *S. Louis v. Jackson*, 25 Mo. 37 (sale of meat in a market house, sustained); *Bloomington v. Wahl*, 46 Ill. 489 (sale of meat, not sustained); *Iler v. Ross*, 63 Neb. —; 90 N. W. Rep. 869 (right to collect ashes, void). See *St. Louis v. Weber*, 44 Mo. 547; *Bowling Green v. Carson*, 10 Bush. 64; *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *Tugman v. Chicago*, 78 Ill. 405; *Bethune v. Hughes*, 28 Ga. 560; *Caldwell v. Alton*, 33 Ill. 417 (sale of vegetables during certain hours of the day, not sustained); *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526; *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611; *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467.

giving power to a city over its streets and to light them, or secure a company to furnish light for that purpose, and to its inhabitants. It has been held in a number of well considered cases that a municipality had the power to grant an exclusive franchise.¹⁵ In a leading New York case a statute authorized a city to enter into a contract for lighting its streets, but did not specify the length of time it was to run; and it was held that it did not confer power to make an absolute and binding contract for a term of years; and that the statute could be repealed while a contract yet had several years to run. It was considered that the city could revoke the contract at any time it saw fit.¹⁶

§446. Grant of exclusive franchise strictly construed.

Courts do not look with favor upon grants to give exclusive rights to occupy the streets and furnish lights to the municipality's inhabitants. Such a grant is strictly construed, in fact, it may be said very strictly construed. Thus an exclusive right to furnish gas light will not confer a right to furnish light by electricity without the consent of the city.¹⁷ And the mere fact that a gas company has the right to lay its pipes in the streets,

¹⁵ *Des Moines St. Ry. Co. v. Des Moines*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602; *Newport v. Newport Light Co.*, 84 Ky. 166; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 34 L. R. A. 518.

¹⁶ *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228, affirming 1 T. and C. 143.

Power not expressly given, will not be presumed, unless necessarily or fairly implied or incident to other powers expressly given — not simply convenient, but indispensable to them. *Los Angeles v. Los Angeles City W. Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; *Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 171

U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W. Rep. 304; *Park Com'rs v. Common Council*, 28 Mich. 228.

"State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes." *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77.

¹⁷ *Newport v. Newport Light Co. (Ky.)*, 11 Ky. L. Rep. 840; 12 S. W. Rep. 1040; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1

the city agreeing to take a certain amount of gas from it for a certain time, from lamps placed on the street by the company, does not give it exclusive right.¹⁸ Nor does a statute give a gas company an exclusive franchise merely because it requires the company to furnish the city gas within three years, and authorizes it to make and sell gas for fifty years.¹⁹ An exclusive franchise to operate a street horse railway does not prevent the municipality granting a franchise to an electric railway company.²⁰ Where a company secured the exclusive right to supply a city with water from a certain creek, which was the most accessible source for the city's water supply, it was held that this did not prevent the city granting to another company the right to supply the city with water taken from some other source.²¹ So where the charter of a company authorized it to take water from a certain pond with water for domestic purposes, and forbade those who had mill privileges on the pond to cut below the pipes of the company or interfere with the water or obstruct the works; it was held that this did not give the company the exclusive right to the water of the pond for the purposes designated; and the legislature could grant to another company the right to take water from such pond.²² In New Jersey, however, a different rule of interpretation was allowed to prevail in one case. A gas company was authorized to lay its pipes, with the consent of the abutting property owners, in a certain city. It did so, and then another company proceeded to do so without any legislative authority whatever. The first company sought and obtained an injunction against the second; and it was held "that the grant of a franchise by the State is, by its own extensic force, and without express words, exclusive against all persons but the State, and that any attempt to exer-

¹⁸ Vincennes v. Citizens' Gaslight and Coke Co., 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485.

¹⁹ Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314. See also Sheffield United Gas Co. v. Sheffield Consumers' Co., 2 Gas J. 360.

²⁰ Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. Rep. 324.

See Des Moines St. Ry. Co. v. Des Moines, etc., Ry. Co., 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602.

²¹ Stein v Bienville Water Supply Co., 34 Fed. Rep. 145; affirmed 141 U. S. 67; 11 Sup. Ct. Rep. 892.

²² Rockland Water Co. v. Camden, etc., Water Co., 80 Me. 544; 15 Atl. Rep. 785.

cise like rights and privileges without legislative authority is a fraud and unwarranted usurpation of power.”²³ In Pennsylvania it was held that a charter “for supplying light and heat by means of natural gas” in a certain city did not conflict with the charter of another company for “the manufacture and supply of gas for fuel heat,” at the same place, both grants being exclusive.²⁴ So a grant to supply “heat to the public from gas” was held not to conflict with another grant for the same territory “for the purpose of supplying heat to the public by means of natural gas conveyed from such adjoining counties as may be convenient.”²⁵ In the absence of words giving an exclusive franchise, a contract between a municipality and a company for gas cannot be construed as such a franchise.*²⁵ A vote of the town authorizing the town council to give a town the right to lay pipes in the streets, followed by the town’s silence for five years without taking action relative to the purchase of the plant (which it had a right to make), of the use of the water by the town for its own hall and drinking fountains where a certain quantity of water was to have been furnished as a condition of the grant of the use of the streets — nor a vote of the town to purchase the company’s works — does not give an exclusive franchise to the company.²⁶ The courts will not adopt such a construction of a statute incorporating a water company as will prevent the State or a municipality from ever after

²³ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

²⁴ *Erie Mining and Natural Gas Co. v. Gas Fuel Co.*, 15 W. N. C. 399. See *Emerson v. Commonwealth*, 108 Pa. St. 111; *Carother’s Appeal*, 118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48; *Johnston v. People’s, etc., Gas Co. (Pa.)*, 5 Cent. Rep. 564; *Sterling’s Appeal*, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49; *Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co.*, 4 Kulp 47; *In re Johnston (Cal.)*, 60 Pac. Rep. 973.

²⁵ *Emerson v. Commonwealth*, 108

Pa. St. 111; 15 W. N. C. 425; 42 Leg. Int. 81.

*²⁵ *Bartholomew v. Austin*, 85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; 17 Sup. Ct. Rep. 718; *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115.

²⁶ *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611. See *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467; *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

using the waters of a stream it has appropriated to its use, for public or municipal purposes, without making compensation to such company, unless the legislative intent is beyond doubt.²⁷ Several cases arose in New Orleans over the attempted annulment by constitutional provisions of exclusive franchises previously granted; and these provisions were held to be void by the Supreme Court of the United States. In one of these cases an ordinance of the city gave the lessee of a hotel a right to supply the hotel with water drawn from the Mississippi river many blocks away through mains laid in the streets, and this was held to impair an exclusive franchise previously granted to a water company to supply the city and its inhabitants with water, although there was a clause in such franchise reserving to the city power to grant to any person who was "contiguous to the river, the privilege of laying pipes to the river, exclusively for his own benefit." It was said that no lot could be contiguous unless it actually fronted on the river, or was separated

²⁷ *St. Anthony Falls Water Power Co. v. Board*, 168 U. S. 349; 18 Sup. Ct. Rep. 157. See *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; 22 N. E. Rep. 381; 5 L. R. A. 546; *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

As an illustration how strictly contracts for an exclusive right to supply a municipality with gas is construed, see a New York case where it was held that a contract of the board of improvements of a town with a gas company to lay its pipes in its streets did not prevent other officers becoming vested with the power to determine whether leave should be granted to other companies to lay pipes in the streets, nor prevent them exercising the power. *Parfitt v. Ferguson*, 3 N. Y. App. Div. 176; 38 N. Y. Supp. 466; affirmed 159 N. Y. 111; 53 N. E. Rep. 707.

Granting a company the right to occupy all the streets in a city is not the granting of an exclusive franchise. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; 60 Fed. Rep. 957; *Hughes v. Mومence*, 163 Ill. 535; 45 N. E. Rep. 300; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; 17 Sup. Ct. Rep. 718; *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 983; 26 L. R. A. 270.

A special act will not be construed to give a monopoly unless it clearly appears to be so intended. *La Campagne pour L'Eclairage au Gas v. La Campagne*; etc., 25 Can. S. C. 168; *Atlantic City W. W. Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; 15 Atl. Rep. 581; *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

from the river only by a public highway, with no private owner intervening, or possibly, on a block or square so located.²⁸

§447. Legislature cannot revoke monopolistic clause of company's charter.

In the previous section, it is said that the legislature had the power to revoke the monopolistic feature of a gas company's charter or franchise, and this is said of a charter where the right to change or revoke that feature was not reserved in the original grant. The Supreme Court of the United States does not take this view of the matter. The Louisiana legislature granted to a gas company the exclusive right, for fifty years, to lay pipes in the streets of New Orleans and furnish gas to the inhabitants of that city. The company laid its pipes in the streets, built its works, and supplied gas for several years. The legislature then granted to another company the right to also lay pipes in the streets and furnish gas; and upon application of the first company, the second company was enjoined, on the theory that the second grant infringed upon the rights of the first company.²⁹ The court was careful to state that the granting of the franchise giving the grantee the exclusive right to furnish gas to the city did not prevent the city adopting proper police regulations for the control of the gas company so far as they related to the health and protection of the inhabitants of the city, and the control of the city's property and streets. Other decisions of this court follow this case.³⁰ The same rule was applied to a gas company created in Kentucky, even though the constitution of that State provided "that all freemen, when they form a social compact, are equal, and that no man or set

²⁸ *New Orleans Water Works v. Rivers*, 115 U. S. 674; 6 Sup. Ct. Rep. 273; *New Orleans W. W. Co. v. Ernst*, 32 Fed. Rep. 5.

²⁹ *New Orleans Gas Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252 (reversing 4 Woods 90); *Créscant City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138; *Bridge Proprietors v. Hoboken*, 1 Wall. 116; *Binghamton*

Bridge, 3 Wall. 51. *Contra*, *Hamilton Gaslight and Coke Co. v. Hamilton*, 37 Fed. Rep. 832.

³⁰ *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674; 6 Sup. Ct. Rep. 273 (reversing 4 Woods 134); *St. Tammany W. W. v. New Orleans W. W.*, 120 U. S. 64 7 Sup. Ct. Rep. 405; *New Orleans W. W. Co. v. Ernst*, 32 Fed. Rep. 5.

of men are entitled to exclusive, separate emoluments or privileges from the community, but in consideration of public services." In 1838 a charter was granted to a gas company; and in 1856 the legislature provided that thereafter "all charters and grants of and to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed." In 1869 this charter of 1838 was amended, granting to a gas company, in such amendment, an exclusive right to occupy the streets of Louisville. In 1872 another statute was passed authorizing another gas company to lay its pipes, with the consent of the city council, in the streets, and to furnish gas to its inhabitants. This latter Act was held void, because it was clear that the Act of 1869 gave the company the right to continue to enjoy the franchise it then possessed for the term therein named without being subject to have its charter in that respect amended or repealed at the will of the legislature.³¹ In Missouri one of the Appellate Courts drew a distinction between the power of the legislature to authorize a gas company to occupy streets to the exclusion of others, and the power to authorize an exclusive right to vend gas for the same time in a city — holding the former a valid grant, and the latter void, because prohibited both by the common law and by a clause in the constitution prohibiting the granting of special privileges.³²

³¹ *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 6 Sup. Ct. Rep. 265; reversing 81 Ky. 263. See *Hovelman v. Kansas City Horse K. R. Co.*, 79 Mo. 632.

³² *St. Louis Gaslight Co. v. St. Louis, etc., Co.*, 16 Mo. App. 52.

An ordinance for the laying of pipes in certain streets is not invalidated by the fact that pipes of a private company exist on some of the streets. *Hughes v. Momen*, 163 Ill. 535; 45 N. E. Rep. 300.

A State cannot even by a consti-

tutional provision abrogate the exclusive clause in the franchise of a water company; and in such an instance a city cannot insist on furnishing the water under the plea that it will furnish a purer and more suitable supply. *St. Tammany W. W. Co. v. New Orleans W. W. Co.*, 120 U. S. 64; 7 Sup. Ct. Rep. 405; 14 Fed. Rep. 194.

But see *Beinville Water Supply Co. v. Mobile* (U. S.), 22 Sup. Ct. Rep. 820; affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

§448. Municipality agreeing not to compete with gas company.

A municipality may bind itself not to compete with a gas company to which it has granted a right to furnish gas to it and its inhabitants, by agreeing in the grant not to engage in furnishing gas as a municipal enterprise for a named period. But it may well be doubted if it could thus bind itself in perpetuity. Thus in the State of Washington a city was chartered by a special Act of the legislature, and was authorized to issue its bonds, not to exceed fifty thousand dollars in amount, to build water works, or to authorize a company to build them. The city authorized a company to put in a water works system, upon the condition that it would furnish free water for city hydrants and for flushing the sewers; and agreed to not build water works of its own for twenty-five years. It was also provided that if the service of the company should prove unsatisfactory, the city might apply to the courts to secure, for sufficient cause, a revocation of the grant. After the company had constructed its works and for several years had supplied water, without securing a revocation of its grant, it submitted the question, pursuant to a general statute, to the people whether or not it should build water works on its own account; and the vote being favorable to the building of them, enacted an ordinance for their construction, and provided for an issue of one hundred and sixty thousand dollars of bonds for that purpose. The court restrained the city from entering upon the enterprise of building its own water works, holding that so long as the first grant remained unrevoked it could not do so; and that the contract not to engage in a competitive work of supplying gas was binding upon the city.³³ The mere grant of a right to build a gas plant, lay pipes in the street, and supply the city and its inhabitants with gas, accompanied by contracts, at different times, for lighting the streets, does not prevent the city, when such contracts are at an end, building its own gas plant and supplying itself and its inhabitants with gas; and that, too, even

³³ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 S. Ct. Rep. 77, affirming 60 Fed. Rep. 957.

though the city had several times fixed the price of gas, under a statute, at which it should be sold to the inhabitants of the city.³⁴ And a statute providing that when any existing company refuses to extend its lines, make connections, or perform certain other duties when required to do so by the municipal authorities, its charter should be forfeited, and the city be at liberty to establish and maintain gas works of its own, passed after the company had been granted a franchise, does not impair the obligation of contracts, within the meaning of the Federal Constitution, although the value of the existing company's franchise is diminished by the city's erecting its own works.³⁵ The fact that the city owns its own gas works does not enable it to prevent a gas company, having the right to do so, from extending its mains and supplying gas to the city's inhabitants at a rate below that at which the city can manufacture and supply it, thereby rendering its enterprise a losing one.³⁶ It has been sometimes held that statutes were so peculiar in their terms that a municipality could not engage in the enterprise of furnishing water, where it had granted the right to a private corporation, even though such grant was not an exclusive one. Such is a case already cited.³⁷ In New York a case arose which rests on such a statute — a very peculiar statute. In that State it has been decided that the fact of a municipality granting to a water company the right to furnish the city and its inhabitants water, containing no grant of an exclusive character, did not prevent it from making the same kind of a grant to another water company;³⁸ and that rule is adhered to in the case now

³⁴ *State v. Hamilton*, 47 Ohio St. 52; 23 N. E. Rep. 935; 29 Am. and Eng. Corp. Cas. 208; *Westerly W. Co. v. Westerly*, 80 Fed. Rep. 611; 75 Fed. Rep. 181; 76 Fed. Rep. 467; *Helena v. Helena W. W. Co.*, 122 Fed. Rep. 1.

³⁵ *Hamilton Gaslight and Coke Co. v. Hamilton*, 146 U. S. 258; 13 Sup. Ct. Rep. 90; affirming 37 Fed. Rep. 832; *State v. Hamilton*, 47 Ohio St. 52; 23 N. E. Rep. 935; 29 Am. and Eng. Corp. Cas. 208;

North Springs Water Co. v. Tacoma, 21 Wash. 517; 58 Pac. Rep. 773; 47 L. R. A. 214.

³⁶ *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

³⁷ See the case of *White v. Meadville*, *supra*. See *Welsh v. Beaver Falls (Pa.)*, 40 Atl. Rep. 784.

³⁸ *In re City of Brooklyn*, 143 N. Y. 596; 38 N. E. Rep. 993; 26 L. R. A. 270; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; 22 N. E. Rep. 381; 5 L. R. A. 546; *Power v.*

under discussion. A village gave a non-exclusive franchise to a water company to construct a water system. After the expiration of the franchise, the village did not purchase the system, as the law provided it might, but began the construction of its own system under a statute which authorized it to levy a tax where the net water receipts were insufficient to pay the indebtedness incurred in building the system when due, and to "establish a scale of water rates for the use of water and also rates for the fire protection to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting or within said distance as such boards may deem beneficial, upon which real property the water is not used, by the owner or occupant thereof for domestic or manufacturing purposes." After the work of constructing a municipal plant was begun, the existing private water company brought suit to enjoin its construction, claiming that the above section was invalid; and the court sustained its claim. The basis of the decision was that, if the net receipts were not sufficient to pay the debt incurred in putting in the plant, the village had the power to tax the private company's plant and all its consumers of water; but if such consumers would abandon it, and take water from the village "for domestic or manufacturing purposes," then their properties were exempt from the tax. The court regarded this as such an unfair provision that it violated that provision in the Federal Constitution prohibiting a State impairing the obligation of a contract.³⁹

Athens, 99 N. Y. 592; 2 N. E. Rep. 609.

³⁹ Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115. See Warsaw W. W. Co. v. Warsaw, 16 N. Y. App. Div. 502; 44 N. Y. Supp. 876.

The contract of a city not to construct a plant of its own may arise

by implication. Tyrone Gas and Water Co. v. Tyrone, 195 Pa. St. 566; 46 Atl. Rep. 134.

If a gas company has the exclusive right to furnish gas to a city, it may maintain a bill to restrain the city proceeding under its general powers to build a plant. Gas and Water Co. v. Dowington, 175 Pa. St. 341; 38 W. N. C. 376; 34 Atl. Rep. 799. See Southwest Mis-

§449. Legislature may not authorize monopolistic grants.

Notwithstanding what has been said in the former sections, there are quite a number of cases which hold that the legislature cannot itself, nor authorize a municipality to grant an exclusive franchise, nor even enter into a contract with a gas or water company to take gas or water from it for a long period of years and agree to exclude all competitors. Such grants or contracts are held to create such a monopoly as the usual clause in a constitution against monopolies prohibits.⁴⁰ The granting of an exclusive right of way to lay pipes in the streets or highways is void under the Texas constitution.⁴¹

**§450. Estoppel to contest validity of monopolistic grant.—
Ratification.**

A municipality is not estopped to deny the validity of a monopolistic grant or contract; for to allow an estoppel to be successfully pleaded, would be to bind the corporation by a grant or contract it had no power to make. A city or town being a public corporation, those who contract with it are as

souri Light Co. v. Joplin, 113 Fed. Rep. 817.

A city cannot insist on furnishing water, to the exclusion of a water company, under the plea that it will furnish a purer and more suitable supply. *St. Tammany W. W. Co. v. New Orleans W. W. Co.*, 120 U. S. 64; 7 Sup. Ct. Rep. 405; 14 Fed. Rep. 194.

⁴⁰ *Brenham v. Brenham Water Co.*, 67 Tex. 542; 4 S. W. Rep. 143; *Janeway v. Duluth*, 65 Minn. 292; 68 N. W. Rep. 243. See *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505. In *Bartholomew v. Austin*, 85 Fed. Rep. 359; 52 U. S. App. 512; 29 C. C. A. 568, the United States Court of Appeals disapprove of this case in passing upon the clause in the constitution of Texas against

monopolies. *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. Rep. 1053; 33 S. W. Rep. 585; *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep. 249; *Minturn v. La Rue*, 23 How. 435 (a ferry right); *Long v. Duluth*, 49 Minn. 280; 51 N. W. Rep. 913; *Atlantic City W. W. Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; 15 Atl. Rep. 581; diametrically opposed to *Atlantic City W. W. Co. v. Atlantic City*, 48 N. J. L. 378.

⁴¹ *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. Rep. 1053; affirming 33 S. W. Rep. 585. See *People v. Bowen*, 30 Barb. 24; affirmed 21 N. Y. 517; *Elmira Gaslight Co. v. Elmira*, 2 Ala. L. Jr. 392.

much bound to know its powers and limitations as its inhabitants and officers; so that it cannot be successfully said that those contracting with it were in ignorance of its power to bind itself or were misled by the representations of its officers.⁴² Silence for five years without taking any action to purchase the plant under a contract, as it had a right to do, or by use of the water for town purposes, or a vote of the town to notify the company of an intention to purchase its plant, or all these together will not estop the city so as to prevent it setting up the invalidity.⁴³ So a clause in a company's charter granting it the right to lay its pipes in the streets of a certain town for an indefinite period, but not granting to or recognizing any authority in the town council to make an exclusive grant of a right therein, will not constitute a ratification of an unauthorized exclusive grant made by it.⁴⁴ And the fact that the company has used the streets for twenty years, even under permission of the city council, will not prevent the court from inquiring into its right to an exclusive use of the streets," and the fact that others have not exercised a similar right does not make the company's uses the exercise of a right to exclude others.⁴⁵

§451. A federal question.

The granting of a second or other franchise impairing the benefit given by an earlier franchise, or its revocation, raises a question under the Constitution of the United States giving the Federal courts jurisdiction when properly raised.⁴⁶

⁴² *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

⁴³ *Westerly W. W. Co. v. Westerly*, 80 Fed. Rep. 611. See *Westerly W. W. Co. v. Westerly*, 75 Fed. Rep. 181; 76 Fed. Rep. 467.

⁴⁴ *Smith v. Westerly*, 19 R. I. 437; 35 Atl. Rep. 526.

⁴⁵ *State v. Cincinnati, etc., Co.*, 18 Ohio St. 262; *Cincinnati Gas-light and Coke Co. v. Avondale*, 43 Ohio St. 257; 1 N. E. Rep. 527.

A city dealing with a gas com-

pany for a long time is estopped to set up the invalidity of such company's organization. *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43; 82 N. W. Rep. 821; *Atlantic City W. W. Co. v. Reed*, 50 N. J. L. 665; 15 Atl. Rep. 10.

⁴⁶ *Walla Walla v. Walla Walla Water Works Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; *Logansport, etc., Gas Co. v. Peru*, 89 Fed. Rep. 185; *Southwestern Missouri Light Co. v. Joplin*, 113 Fed. Rep. 817.

§452. Monopolistic clause does not avoid whole contract.

A clause to furnish gas or water in which is an objectionable monopolistic clause will not avoid the whole contract. The agreement to pay for the gas or water remains in force and the city or town entering into the contract is bound thereby.⁴⁷

§453. Enjoining passage of ordinance.

A court has no power to enjoin the passage of an ordinance granting to a second company a franchise which is a direct violation of a previous grant made by it, or is in violation of a statute giving such an exclusive franchise. The court will wait until a contest may arise between the claimants under the two franchises or in some other way arising after the ordinance has been enacted.⁴⁸

§454. Forfeiture of exclusive franchise.

A gas or water company given an exclusive privilege to supply a city with gas or water will lose such privilege, so far as it is exclusive, unless it complies with the duty imposed upon it to furnish gas or water. It must provide adequate mains for the delivery of gas or water to all parts of the city in sufficient quantities for the wants of the inhabitants; not, however, being compelled to enter those regions where the number of consumers, and where public lights or water are not needed, or will be so few as to make the cost of supplying them out of all proportion to the amount of the income derived from the sale of gas or water.⁴⁹ And before a court will protect it in its exclusive franchise it

⁴⁷ Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. Rep. 271; 40 U. S. App. 257; 22 C. C. A. 171; 34 L. R. A. 518; Jackson County Horse Ry. Co. v. Interstate Rapid Transit R. R. Co., 24 Fed. Rep. 306; Lewis v. Newton, 75 Fed. Rep. 884.

Moines, 44 Ia. 505; Montgomery Gaslight Co. v. Montgomery, 87 Ala. 245; 6 So. Rep. 113; 4 L. R. A. 616.

⁴⁹ New Orleans Water Works Co. v. Rivers, 115 U. S. 674; 6 Sup. Ct. Rep. 273; New Orleans W. W. Co. v. Ernst, 32 Fed. Rep. 5.

⁴⁸ Des Moines Gas Co. v. Des

must show some honest and active efforts to assert and exercise the right claimed by it.⁵⁰

§455. Exclusive franchise for artificial gas does not exclude natural gas.

We have an illustration how strictly an exclusive franchise is construed in several natural gas cases. Thus an early statute in a State authorized the giving to a corporation the exclusive right to supply a town with gaslight, and to erect the necessary buildings to manufacture and distribute the gas. It was held that this exclusive franchise did not prevent the town giving to a natural gas company the right to furnish gas, although such company would supply gas for lighting purposes.⁵¹

§456. Extension of time for completion of work. Additional requirements.

If a gas or water company fails to complete the works it has undertaken, in compliance with the requirements imposed upon it by the city, such city may impose additional terms or exact additional requirements in extending the time for the completion of such works.⁵²

⁵⁰ It will not be permitted to copy the conduct of the "dog in the manger." *Scranton Electric Light and Heat Co. v. Scranton, etc., Co.*, 3 Pa. Co. Ct. Rep. 628.

⁵¹ *Warren Gaslight Co. v. Pennsylvania Gas Co.*, 161 Pa. St. 510; 29 Atl. Rep. 101; *Hagan v. Fayette Gas-Fuel Co.*, 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.) 229.

A charter to "manufacture and sell calcium carbide and its product, and purposes incident thereto and connected therewith," does not come in conflict with one giving an exclusive franchise for the supply of gaslight. *Lebanon Gas Co. v. Lebanon Fuel, etc., Co.*, 5 Pa. Dist. Rep.

529; 18 Pa. Co. Ct. Rep. 223; *Johnston v. People's, etc., Gas Co. (Pa.)*, 7 Atl. Rep. 167; 5 Cent. Rep. 564.

For analogous cases, see *Malone v. Lancaster, etc., Co.*, 182 Pa. St. 300; 40 W. R. C. 434; 15 Nat. Corp. Rep. 98; 14 Lanc. L. Rev. 321; 37 Atl. Rep. 932; *Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co. (Pa.)*, 4 Kulp 47; *Emmerson v. Commonwealth*, 108 Pa. St. 111; *Carother's Appeal*, 118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48; *Sterling's Appeal*, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49; *In re Johnston (Cal.)*, 69 Pac. Rep. 973.

⁵² *Eureka Light-Ice Co. v. Eureka*, 5 Kan. App. 669; 48 Pac. Rep. 935.

§457. Gas works built under void grant or franchise.

In a number of instances gas and water works have been built under contracts with municipalities extending exclusive rights to furnish gas or water for the city and its inhabitants, sometimes in perpetuity, but usually for a long term of years; and under these grants the companies have gone on at a great expense, built their works, bonded them, and furnished gas or water for several years, before the question of validity of the grant or franchise was raised. Usually the question in such instances is raised in a suit against the municipality to recover pay for gas or water furnished, and then it is quickly settled, the court holding that in such an instance the validity of the grant cannot be litigated.⁵³ But in other instances where the question is properly raised the courts will not hold the contract void until, at least, after a reasonable time has expired after it was made, especially where the municipality's conditions have not changed as to population and assessed valuation, where no better facilities are offered upon more reasonable terms, and where the company would suffer irreparable loss.⁵⁴

§458. Municipality's right to purchase existing works is optional.

Statutes frequently give municipalities the power to purchase from a private company putting in works under contract with them, its plant, and providing machinery to determine the price that shall be paid. Usually in all cases it is entirely optional with the municipalities to purchase these plants.⁵⁵ In such instances

⁵³ *State v. Great Falls*, 19 Mont. 518; 49 Pac. Rep. 15; *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Sup. Ct. Rep. 234.

⁵⁴ *Columbus Water Co. v. Columbus*, 48 Kan. 378; 29 Pac. Rep. 762; 15 L. R. A. 354; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; 40 U. S. App. 257; 22 C. C. A. 171; 34 L. R. A. 518; *Anoka W. W., etc., Co. v. Anoka*, 109 Fed. Rep. 580, bondholder's rights. See *Madison v. Morristown, etc., Co.* (N. J. Ch.), 52 Atl. Rep.

158; *Morristown v. East Tennessee, etc., Co.*, 115 Fed. Rep. 304; *Beinville Water Supply Co. v. Mobile* (U. S.), 22 Sup. Ct. Rep. 820; affirming 175 U. S. 109; 20 Sup. Ct. Rep. 40.

⁵⁵ *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154; 55 N. E. Rep. 562; affirming 33 N. Y. App. Div. 642; 54 N. Y. Supp. 1115; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 188.

the city must exercise its option at the time designated in the contract. If the price to be paid is to be settled by arbitrators to be chosen, one by the city and the other by the company, for instance, the city cannot insist that the company enter into an arbitration before such city has determined to exercise its option and buy the works. If the company refuse to select an arbitrator, the city may insist that it has forfeited its franchise, especially is this true where the grant is illegal because it is an exclusive one.⁵⁶

§459. Unlawful combinations between gas companies.

Combinations between two gas or lighting companies sometimes assume monopolistic features and are void. Thus an agreement between two companies that neither would furnish gas to the consumers of the other is void, and furnishes a basis for a monopoly; and because of that fact the courts may declare their franchises forfeited.⁵⁷ So much so is a contract of this character void that a person undertaking to secure an agreement between two companies to divide the territory of the city between them, and the one not to compete in the territory assigned to the other, cannot recover for his services.⁵⁸

§460. Granting privilege to use streets does not require a general ordinance — general ordinance regulating streets.

A municipal authority, however, whether it is forbidden or not empowered to give an exclusive grant to a gas company to

⁵⁶ *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 372; 5 So. Rep. 735; 4 L. R. A. 616.

The bringing of a suit for the appointment of commissioners to assess the value of the property to be purchased by the city is sufficient evidence of a disagreement between the company and the city as to the value of such property. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482; 16 N. E. Rep. 420.

⁵⁷ *State v. Portland Natural Gas and Oil Co.*, 153 Ind. 483; 53 N. E.

Rep. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; 41 N. E. Rep. 1048; 51 Am. St. Rep. 193; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Chicago Gaslight and Coke Co. v. People's Gaslight and Coke Co.*, 121 Ill. 530; 13 N. E. Rep. 169; *Pittsburgh Carbon Co. v. Philadelphia Co.*, 130 Pa. St. 438; 18 Atl. Rep. 732.

⁵⁸ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553.

use its streets, may practically achieve the same end, by granting to a special company the right to use its streets, and refraining from granting it to others. Such action of the municipality is not void, nor does it violate any clause of a constitution or statute forbidding the granting of special privileges. Speaking of an ordinance of this character, the Supreme Court of Indiana said: "It does, it is true, grant a right to use the streets of the town, but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It cannot be held that permission to one company to use the streets excludes others; on the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use streets does not obtain a monopoly. The right to grant other license remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. A private corporation that obtains a license to use the streets of a municipality takes it subject to the power of the municipality to enact a general ordinance; for a governmental power, such as that exercised in enacting police regulations, cannot be surrendered or bartered away even by express contract. But there is here no attempt to surrender or barter away this governmental power, for there is nothing more than a license to use the streets of the town. . . . Where a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance, but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specially license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like, for where the municipal authorities assume to legislate upon the entire subject a general ordinance is required; but where they simply grant a privilege to use the streets, and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But

neither by a general ordinance nor by a special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege is in its nature monopolistic, and, . . . when this is so, the grant of the franchise is of necessity the part of monopolistic right; but in such a case the corporate grant does not create the monopoly. In this instance there is nothing more than the grant of a license; there is no attempt to create exclusive privileges, nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality, for no licensee can acquire rights not subject to regulation under the police power delegated to the local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective."⁵⁹ In a case arising in the Federal Circuit Court of the Eastern District of Michigan it was said: "It is true it may, in effect, grant such exclusive right by refusing to any other company the franchise or privilege it has granted to one; but this presupposes a continued and abiding consent on the part of the city to keep alive its contract, and it is quite distinct from the right of the city to surrender its power to make another contract, and to vest in the plaintiff the right to determine for itself whether a rival company shall be permitted to enter its domain."⁶⁰

§461. Contracts for light, length of term.

Another kind of municipal grants or contracts having in them monopolistic features is a contract to furnish a municipality all the light it needs for a term of years. These contracts in a measure are exclusive grants; for by them the gas companies usually have the right for a term of years to supply

⁵⁹ Crowder v. Sullivan, 128 Ind. 486; 28 N. E. Rep. 94; 13 L. R. A. 647. See also State v. Cincinnati Gaslight and Coke Co., 18 Ohio St. 262.

⁶⁰ Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; 16 Am. and Eng. Corp. Cas. 562. See Garrison v. Chicago, 7 Biss. 480.

the municipality with all the gas or light it needs and also its inhabitants; and frequently they contain agreements not to give similar grants to other companies while the contract remains in force. A case of this character arose in Indiana where it has been declared that a municipality cannot give an exclusive grant to a gas company, although this declaration was made many years after the case here referred to arose. A gas company was empowered by its legislative charter "to manufacture and sell gas . . . for the purpose of lighting" a certain city or its streets, "and any buildings, manufactories, public places, or houses therein contained," "for the term of twenty years." The same charter authorized the city, "in its corporate capacity . . . to contract with the said company to furnish gas for the purpose of lighting the streets, engine houses, market houses, or any public places or buildings, and may provide means to pay for the same in such manner as they may deem best." The general law for the incorporation of cities of a later date empowered them "to construct and establish gas works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expense of lighting any street or alley shall be paid by the owners of lots fronting hereon." In 1876 the city entered into a contract with a gas company, in the form of an ordinance, whereby the latter agreed to furnish gas of a quality specified in an ordinance of 1866 for the supply of all the street lamps, city offices, engine houses, and all other places where gas was required for the use of the city in its corporate capacity, in consideration of an agreed compensation, the contract to be in full force and operation for the term of five years from its date, and a further term of five years, if the city so elected. It was agreed that this contract of 1876 should not be taken to alter, modify or suspend the provision of a contract then in existence between them, entered into by them in 1866 for a term of twenty years, except so far as to give effect to its terms; and when the contract of 1876 terminated, either by the expiration of the time limited, or by the failure or refusal of the city to

perform its part, then the contract of 1866 was to "stand and continue for the parties hereto . . . in all respects as though this contract had never been made." The city had the power under these contracts to clean and repair, at the company's expense, the street lamps if it did not; and to make certain deductions for failure to light lamps and keep them burning. The city denied the validity of the contract of 1876; but the court upheld it, saying that it was undoubtedly valid. No discussion was entered upon concerning the contract of 1866, but it seems to be conceded that it was valid. "By the contract we are considering," said the Supreme Court, "the city of Indianapolis is not restricted in any respect from the legitimate exercise of its public powers touching the subject matter of the contract, but expressly reserves its administrative authority to keep the posts, lamps and burners in good order and repair, if the gas company should fail to do so; and also reserves the right to test the quality of the gas furnished by the company, and the capacity of the burners, at all times. We cannot see wherein, by the contract, the city is restricted from extending its streets, establishing an additional number of lamps obtaining gas from other sources, or establishing its own gas works, as the public interests might require, and all this it can do without violating its contract. No exclusive right is granted to the gas company."⁶¹ It will be observed that in this

⁶¹ Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396.

The court called attention to the case of Garrison v. Chicago, 7 Biss. 480, relied upon by the city, where a ten-year contract was declared void, to the fact that it had been declared void because no appropriation for it had been previously made as the city charter expressly required. The court also pointed out that the case of Gale v. Kalamazoo, 23 Mich. 344, was an instance where the city has authorized Gale to build a market house, to be put under the control of the city authorities. the stalls to be rented as agreed

upon between Gale and the lessees, the rent to be paid to him, and the contract to run ten years. The village was to appoint a manager of the market, and there was to be no other market house in the village, and no marketing elsewhere during market hours. "The vice," said the Indiana court, "of this contract lay, not in its agreement to have a market house built, but in the fact that the public authorities had undertaken to part with their control over it when built, and place its management in the power of private speculators. This they could not do."

case the court held the five-year contract valid, although it was devoid of the exclusive features so often characteristic of these contracts, such as the contracts of 1866. Statutes frequently empower cities to make exclusive contracts with gas and water companies, for a certain number of years, and these are upheld by the courts; but the statutes are also limitations upon the powers of cities, for the limitation therein named cannot be exceeded; but if the attempt is made to exceed that limit, the entire contract will not be invalid if the excess can be distinctly separated from the remainder of the contract. Thus where a statute permitted a city to enter into a contract for twenty years, and a city entered into a contract for twenty years with a provision that it should remain in force for an additional twenty years if the city had not purchased the works before the expiration of the first term, the contract was held valid for the original twenty years.⁶² A contract for thirty years has been held not so long a time that the court would say as a matter of law it was unreasonable.⁶³ A statute empowering a municipality to contract for water from year to year, is sufficient to uphold a contract to extend for twenty years from the time of making it.⁶⁴ A contract to take a cer-

⁶² *Neosho City Water Co. v. Neosho*, 136 Mo. 498; 38 S. W. Rep. 89; *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383. See *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; 16 U. S. App. 588.

⁶³ *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76; 80 N. W. Rep. 1113; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586; *Des Moines etc., R. R. Co. v. Des Moines, etc., Co.*, 73 Ia. 513; 33 N. W. Rep. 610; 35 N. W. Rep. 602 (25 years).

⁶⁴ *Light, H. and W. Co. v. Jackson*, 73 Miss. 598; 19 So. Rep. 771.

If the city council are expressly authorized to grant an exclusive privilege, the consent of the people of the city to such franchise is not

required. *Lawrence v. Hennessy*, 165 Mo. 659; 65 S. W. Rep. 717.

While an exclusive grant for twenty years is void so far as the limit is concerned; yet the company under it have the right to put its pipes in the street, no limit being fixed when its rights shall cease. *Hamilton v. Hamilton Gaslight Co.*, 11 Ohio Dec. 513.

In the following cases the contracts were held invalid, not because of the length of the term, but because the city had no power to execute an exclusive contract: *Long v. Duluth*, 49 Minn. 280; 51 N. W. Rep. 913 (30 years); *Brenham v. Brenham Water Co.*, 67 Tex. 542; 4 So. W. Rep. 143 (25 years); *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep. 249 (25 years).

tain amount of gas for a special period of time, leaving it the unrestricted right to either manufacture or purchase as much as it desires, is not a monopolistic contract, and is not invalid even in those States where the statute or constitution prohibit exclusive grants, and contracts.⁶⁵ The rule that members of a legislative body of a city may not so act or contract as to deprive their successors of the unimpaired governmental or legislative power does not apply to the exercise of the business or property proprietary powers of the city, such as is exercised in entering into a contract for gas or water.⁶⁶

§462. Dating contract ahead.

It is a favorite scheme of promoters to secure an exclusive right to occupy the streets of a city or town for the purpose of speculation, and not with the intention of themselves putting in a plant, unless they are not able to dispose of the rights they have obtained. If these grants do not require completion of the works for several years, then the municipal authorities in office have, in a measure at least, anticipated and exercised the authority of future officers of the city or town — a thing neither the legislature nor the courts are disposed to sanction. Courts, therefore, are inclined to construe grants giving rights to occupy streets and maintain plants as require immediate action on the part of the grantees, or within a reasonable time thereafter. Thus where a statute provided that from and after its passage any gas company should have the power to extend its mains or lay its pipes for conducting gas in any of the public highways of the towns where located, with the written consent of the public board of improvement, and under such reasonable regulations as it might prescribe, it was held that when such a company

⁶⁵ Vincennes v. Citizens' Gaslight Co., 132 Ind. 114; 31 N. E. Rep. 573; 16 L. R. A. 485; Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416. The court calls attention to Davenport v. Kleinschmidt, *supra*, and Matter of Union Ferry Co., 98 N. Y. 139, by pointing out that the

grants in these cases forbade the city or State dealing with any other person or company.

⁶⁶ Illinois Trust and Savings Bank v. Arkansas, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518.

seeks to extend its mains or lay its pipes it was the duty of such board to then exercise its judgment as to whether consent shall be given; and it could not contract in advance that no other could have its consent to extend its mains or lay its pipes.⁶⁷

⁶⁷ Parfitt v. Ferguson, 3 N. Y. N. Y. Supp. 466; 159 N. Y. 111; 53 App. 176; 73 N. Y. St. Rep. 621; 38 N. E. Rep. 707.

CHAPTER XXIII.

STREETS AND HIGHWAYS.

- §463. Definitions.— Street a highway.
- §464. Control of streets or highways.
- §465. Use for private purposes.
- §466. Consent of municipality to occupy streets necessary.
- §467. Right to grant a franchise not property of municipality.
- §468. When consent of municipality not necessary.
- §469. Nature of a grant to occupy streets or highways.— A mere privilege.
- §470. Nature of a grant to occupy streets or highways.— A franchise.
- §471. Acceptance of grant.
- §472. Gas company must comply with conditions of grant.
- §473. Grant to occupy streets construed strictly.
- §474. What streets company may occupy.— Sidewalk.
- §475. Territory annexed to another municipality after grant made.
- §476. New streets, right to occupy.— No streets specified.
- §477. Sale or assignment of right in streets.
- §478. Change of use of franchise.— Natural gas.
- §479. Ordinance void.— Estoppel.
- §480. Gas company occupying streets is subject to municipal regulations.
- §481. Injunction to protect company's rights in streets.
- §482. Grant before company is organized.
- §483. Length of grant of franchise.
- §484. Termination of life of corporation before expiration of franchise.
- §485. Consolidation of gas companies.
- §486. Town becoming a city.
- §487. Injunction to restrain laying of pipes in streets.
- §488. Pipe laid in street unlawfully laid out.
- §489. Revocation of grant.
- §490. Forfeiture of right to occupy streets for failure to perform duty.
- §491. Action to declare forfeiture.— *Quo warranto*.
- §492. Waiver of right to declare forfeiture.
- §493. Changing grade of streets.
- §494. Tearing up streets.— Obstruction.— Indictment.
- §495. Cutting into modern pavements.— Repairs.— Permission.
- §496. Injury to pipes in repairing streets.
- §497. Support of gas mains.
- §498. Gas boxes in street.

- §499. Leaving gasposts in street.
 §500. Pipes in streets not an additional burden.
 §501. Pipes laid in navigable river.
 §502. Grant of right to use suburban highway.— Compensation to abutting land owner.
 §503. Condemnation of land owner's interest in highway.
 §504. Land owner acquiescing in occupation of rural highway.— Injunction.— Estoppel.
 §505. Pipe lines in country highway an additional burden on easement.
 §506. Consent of county.— Public highways, crossing.
 §507. Revocation of license to use highway.
 §508. Abutting land owner removing pipe lines.
 §509. Company may not remove pipes unlawfully laid in rural highway.
 §510. Pipes on surface of highway of street.

§463. Definitions.— Street a highway.

The term "highway" is generic. It includes all public ways, and means a way which every person, whether an inhabitant or stranger, may use for passage or traffic. It includes streets in a city or town, turnpikes, plankroads, footways, sidewalks and bridges.¹ A public alley is as much a public highway as a public street. In usage the term street is applied to ways in a city or town, and is seldom applied to a public way in the country.² But as has been aptly said, "Every street is a highway, but every highway is not a street."³ A *cul de sac* may be a public highway, according to the later and better considered cases,⁴ depending, however on the facts in each instance.⁵

§464. Control of streets or highways.

Control of streets in a city or town is almost universally vested in the city or town; *⁵ and it is an anomalous case where

¹ *Mobile and Ohio R. R. Co. v. Davis*, 130 Ill. 146; 22 N. E. Rep. 850; *State v. Wilkinson*, 2 Vt. 480; *Davis v. Smith*, 130 Mass. 113; *State v. Mathis*, 21 Ind. 277; *State v. Berdetta*, 73 Ind. 185; 20 Am. Law Reg. 342; 38 Am. Rep. 117.

² A notable exception is the old Roman road in England, called "Watling Street."

³ *Indianapolis v. Croas*, 7 Ind. 9,

12; *Brace v. New York Central R. R. Co.*, 27 N. Y. 269; *Heiple v. East Portland*, 13 Ore. 97.

⁴ *Adams v. Harrington*, 114 Ind. 66; 14 N. E. Rep. 603; *Sheafe v. People*, 87 Ill. 189; 29 Am. Rep. 49; *People v. Kingman*, 24 N. Y. 559.

⁵ *State v. Frazier*, 28 Ind. 196; *Bateman v. Bluck*, 14 Eng. L. and Eq. 69.

*⁵ *Hughes v. Momence*, 163 Ill.

this is not true.⁶ In the case of public country highways, control over them is usually vested in the county*⁶ although there is some variance from this rule. The entire matter is usually the subject of statutory provisions; and such statutes must be considered in determining the power of a city, town or county over the streets or highways and the rights of a gas company therein.⁷

§465. Use for private purposes.

Public highways and streets are for the use of the public, and not for private use. An individual in passing along them, is not devoting them in the strict sense of the term, to his own private use. "A grant of public street or highway through either town or country, cannot be considered otherwise than as a grant to the public. It confers no exclusive right; but *ex vi termini*, absolutely excludes the idea of private appropriation."⁷ The same court from which this quotation is made has declared that "public highways belong, from side to side and end to end, to the public";⁸ and this necessarily carries with it the corollary that no one can take a public highway for his own private use; for if he do, the public are excluded from it by his occupation of its surface. "A man

535; 45 N. E. Rep. 300; State v. St. Louis, 145 Mo. 551; 46 S. W. Rep. 981; Sharp v. South Omaha, 53 Neb. 700; 74 N. W. Rep. 76; Coffeyville, etc., Co. v. Citizens', etc., Co., 55 Kan. 173; 40 Pac. Rep. 326; Mueller v. Egg Harbor City, 55 N. J. L. 245; 26 Atl. Rep. 89; Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346.

⁶ Bennington v. Smith, 29 Vt. 254. See Philadelphia Co. v. Freeport, 167 Pa. St. 27; 31 Atl. Rep. 571.

*⁶ Consumers' Gas Trust Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34; Board v. Indianapolis, 132 Ind. 27; 33 N. E. Rep. 972.

⁷ A power in a municipality "to

light the streets; to provide a supply of water for the use of the inhabitants," does not confer the right to pass an ordinance authorizing a gas company to lay mains in the streets to supply gas for domestic purposes. Ransberry v. Keller, 9 Pa. Co. Ct. Rep. 299.

Under the "general welfare" clause, a city cannot confer a franchise for the owning and operating of water works, and for other things collateral thereto. National Foundry, etc., Works v. Oconto Water Co., 52 Fed. Rep. 29.

*⁷ Conner v. New Albany, 1 Blackf. 43.

⁸ State v. Berdetta, 73 Ind. 185; 20 Am. Law Reg. 342; 38 Am. Rep. 117.

has no right," was said in an old case, "to eke out the inconvenience of his own premises by taking the public highway into his timber yard." *⁸ Thus it has been held that a fruit stand in a street is a nuisance *per se* ⁹ and so are hayscales, *⁹ a stairway,¹⁰ a railroad.¹¹

§466. Consent of municipality to occupy streets necessary.

Where a municipality has control over its streets and public ways, its consent to occupy such streets and ways with gas pipes or mains must be obtained before a company can lay them therein. Any such occupation without such consent is illegal.¹² But the building of a plant for the manufacture of gas, and not for distribution is a very different thing, and permission from the city or town to build it is no more necessary than if it were any other kind of a manufacturing establishment. It cannot be said that the manufacture of gas is so dangerous as the manufacture of gun powder or dynamite; and that its manufacture comes within the power of a municipality to prevent the manufacture and storage of dangerous and highly explosive materials within its boundaries. Although a city has no express power itself to lay pipes in its streets, yet under a general power or right to legislate fully in regard to lighting its streets, authority by implication is given it to direct by ordinance that gas pipes be laid in the streets for the purpose

*⁸ King v. Jones, 3 Camp. 230; Rex v. Cross, 3 Camp. 224.

⁹ State v. Berdetta, *supra*.

*⁹ Emerson v. Babcock, 66 Ia. 257; 55 Am. Rep. 273.

¹⁰ Pettis v. Johnson, 56 Ind. 139.

¹¹ Commonwealth v. Nashua, etc., R. R. Co., 2 Gray 54; Commonwealth v. Old Colony, etc., R. R. Co., 14 Gray 93; Schwede v. Hemrich Bros. Brewing Co. (Wash.), 69 Pac. Rep. 362.

The use of water works is a public one, if every inhabitant of the city along the pipe lines can obtain water if he desires it even though

the city does not use the water in its public buildings or supply its hydrants. Smith v. Lincoln, 170 Mass. 488; 49 N. E. Rep. 640.

¹² Carlisle Gas and Water Co. v. Carlisle Water Co., 182 Pa. St. 17; 37 Atl. Rep. 821; Appeal of City of Pittsburgh (Pa.), 7 Atl. Rep. 778; Chicago, etc., v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346. Under the constitution of California (Art. 11. Sec. 19), a permit is not necessary. *In re Johnston*, 137 Cal. 115; 60 Pac. Rep. 973.

of lighting. In fact, it is said, a municipal corporation has the inherent power to lay gas-pipes in its streets for the benefit of its inhabitants.¹³ A statute which authorizes corporations to exercise all powers necessary to carry into effect the objects for which they are formed does not authorize a gas company, incorporated for a particular town, to lay its pipes in the streets of such town without the consent of the municipal authorities.¹⁴

¹³ *Strawbridge v. Philadelphia* (Pa.), 13 Rep. 216; 13 Phila. 173. As to whether a gas plant is a dangerous agency, see sec. 389 and the chapter on Nuisances.

As to what municipal body grants permission to occupy the streets of New York City, see *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; 53 N. E. Rep. 692, reversing 34 N. Y. App. Div. 551; 56 N. Y. Supp. 450.

That a gas company must first obtain permission from a municipality to occupy its streets, see *Missouri v. Murphy*, 170 U. S. 78; 18 Sup. Ct. Rep. 505; *Witcher v. Holland W. W. Co.*, 66 Hun 619; 20 N. Y. Supp. 560; *Philadelphia Co. v. Freeport*, 167 Pa. St. 279; 31 Atl. Rep. 571; *Carlisle Gas and Water Co. v. Carlisle Water Co.*, 182 Pa. St. 17; 37 Atl. Rep. 821.

¹⁴ *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616, affirming 24 Ill. App. 346.

A consent secured by bribery is invalid. *Keogh v. Pittston, etc., Co.*, 5 Lack. Leg. N. 242.

An ordinance of a borough in Pennsylvania authorizing a gas company to lay its mains in the streets was held void, where the borough had no power to authorize the supplying of gas to its inhabitants. *Ransberry v. Kellar*, 9 Pa. Co. Ct. Rep. 299.

A statute empowering a municipi-

pality to grant the use of its streets to lay pipes and drains to supply heat and power, does not authorize the grant of a use to lay pipes to a company for the benefit of its own private use for an automatic package delivery, operated by compressed air. *Ampt v. Cincinnati*, 6 Ohio N. P. 401.

The use must be a public one. *Witcher v. Holland W. W. Co.*, 66 Hun 619; 20 N. Y. Supp. 560; *Schwede v. Hemrich, etc., Co.* (Wash.), 69 Pac. Rep. 362.

Where no question of an exclusive franchise is involved, or a municipality has no power to grant it, a company may be authorized to lay its pipes, in a street in which another company has its pipes, or the city may lay its own pipes there. *Hughes v. Momence*, 163 Ill. 535; 45 N. E. Rep. 300.

The borough Act of 1897 of New Jersey, providing that the borough council may prescribe the manner in which individuals or corporations may exercise any privilege granted them in the use of the street, only authorizes the regulation, not the prohibition, of such privileges. An ordinance giving the street committee of the borough arbitrary power to refuse a permit to tear up the streets for the purpose of laying pipes therein is void. *Madison v. Morristown* (N. J. Ch.), 52 Atl. Rep. 158.

§467. Right to grant a franchise not property of municipality.

The right of a municipality to grant permission to a gas company to lay down pipes in its streets to supply gas is not a part of the municipality's property, to which the corporate authority of such municipality is to revert for purposes of revenue. The municipality is not bound to sell such permission or treat it as a part of the municipal property which is to be used for the purposes of municipal revenue.¹⁵

§468. When consent of municipality not necessary.

Occasionally the charter of a gas or water company is so drafted by the legislature as to give the company the right to enter upon and lay its pipes or mains in the streets of the municipality for which it is chartered without the consent of the municipal authorities. Thus where the charter of a company expressly authorized it to lay its pipes under any highway or street of a particular city, it was held that the company need not first obtain the consent of the city before putting down its mains in the streets, and that a statute giving the board of public works of the city exclusive control over the use of all the streets of such city did not repeal that provision of the company's charter conferring upon it the right to so lay its pipes.¹⁶

Where a statute provided that a company might "lay its wires underground as the same may be necessary and in so many streets, squares, highways, lanes and public places as

A power to grant a privilege or franchise "by ordinance" in Tennessee cannot be made by a mere resolution; and if such a grant is made by ordinance, it cannot be amended by a resolution. *Morristown v. East, etc., Co.*, 115 Fed. Rep. 304.

In Washington only the city council can make the grant, not the board of public works. *Schwede v. Hemrich Bros., etc., Co.* (Wash.), 69 Pac. Rep. 362.

Permission to lay its pipes in the streets of one municipality cannot be so stretched by a gas company as to enable it to lay them in another and distinct municipality. *Madison v. Morristown Gaslight Co.* (N. J.), 54 Atl. Rep. 439.

¹⁵ *Smith v. Metropolitan Gaslight Co.*, 12 How. Pr. 187.

¹⁶ *Louisville v. Louisville Water Co.*, 105 Ky. 754; 49 S. W. Rep. 766; *Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106.

may be deemed necessary for the purpose of supplying electricity and gas for light, power and heating, the whole however without doing any unnecessary damage and providing all proper facilities for free passage through the said streets, squares, highways, lanes and public places while the works are in progress," it was held that the power to break the surface of the streets, and to excavate them for the purpose stated in the statute was such a right as would be protected by injunction, to restrain the municipality from interfering with its laying the pipes in the streets.¹⁷ A statute gave extensive powers to electric lighting companies, conferring upon them the right to use the streets, avenues, highways and alleys in the State for the purpose of erecting poles to sustain necessary wires, with the proviso that no poles should be erected in any street of any incorporated "city or town" without first obtaining from such incorporated "city or town" a designation of the streets in which it desired to place such poles, and the manner of placing the same. It was held that an electric

¹⁷ *Montreal v. Standard Light and Power Co.* [1897], App. Cas. 527; 66 L. J. P. C. 113; 77 L. T. 115; *Hill v. Wallasey L. B.* [1894], 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 7 Rep. 51.

In England where the Public Health Act of 1875 vests in urban authority only such property in the soil of the street as is necessary for the control, protection, and maintenance of the street as a highway for public use, it confers upon them no authority to make excavations in the soil below the surface for the purpose of public convenience (*Tunbridge Wells Corporation v. Baird* [1896], App. Cas. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788); and it was held that an electric lighting company, which had illegally broken up the surface of a street within a vestry district and placed its pipes and wires two feet below the surface, would not

be compelled, at the suit of the vestry, to remove such pipes and wires, there being no continuing trespass upon or interference with any right of the vestry; for such vestry did not own the soil at the depth where the pipes and wires lay. *Vestry of St. Mary v. County, etc., Co.* [1899], 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 31; 15 T. L. Rep. 175.

For a case where a statute authorized a gas company to cross a public highway without first securing authority so to do from local authority, although not to lay its pipes along such highways, see *Consumers' Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285; 40 N. E. Rep. 34.

A right given to lay pipes in a street gives authority to lay lateral as well as main pipes, and to place gas boxes in such street: *District of Columbia v. Washington Gaslight Co.* 20 D. C. 39.

company could place its poles in the highway of a township without leave of the county or township authorities, the words "city or town" not including such territories of the State.¹⁸ A statute authorized a company to lay its conductors and mains under all the streets of the City of New York, in consideration of a reduction by the company of the price of gas. A subsequent statute repealed this statute, but provided that the repeal should "not effect or impair any act done, or right accruing, accrued, or acquired" under the repealed act, and that "the same may be asserted and enforced as fully and to the same extent as if such law had not been repealed." It was held that such company was not deprived of its right to lay new mains necessary to complete unfinished work, and to make connections between the mains previously laid by it.¹⁹

§469. Nature of a grant to occupy streets or highways.—A mere privilege.

There is much confusion in the books and opinions of courts concerning the nature of the grant to a gas, water or other company to occupy the streets of a municipality or a public highway in the country with its pipes or railroad tracks. In-

¹⁸ *Suburban, etc., Co. v. East Orange* (N. J.), 44 Atl. Rep. 628.

¹⁹ *People v. Gilroy*, 67 Hun. 323; 22 N. Y. Supp. 271.

Where a company was authorized to construct, lay and operate pneumatic tubes within and between cities, it was held that this did not by itself empower it to lay its tubes along the suspension bridge between New York City and Brooklyn without the consent of the officers in control of it. *New York Mail, etc., Co. v. Shea*, 30 N. Y. App. Div. 266; 51 N. Y. Supp. 563, reversing 49 N. Y. Supp. 951. See *Glasgow v. Glasgow, etc., R. R. Co.* [1895], App. Cas. 376; 64 L. J. P. C. 171; 72 L. T. 809; 59 J. P. 788; 11 Rep. 226.

A company in Pennsylvania in good faith having laid pipes in the streets of a city, without consent of the city, prior to May 29, 1885, comes within the exception to sec. 16 of that Act. *Appeal of Alleghaney* (Pa.), 11 Atl. Rep. 658.

A statute may be broad enough to authorize a water company located in one village to lay its pipes through another village, without the latter's consent, in order to reach a third village it has contracted to supply with water. *Tarrytown v. Pocontico W. W. Co.*, 1 N. Y. Supp. 394.

As to California constitutional provisions, see *In re Johnston*, 137 Cal. 115; 69 Pac. Rep. 973.

deed, no writer upon the subject can escape falling into that confusion in the use of terms as he applies them to such grants. Sometimes they are called "franchises," sometimes "privileges," occasionally "grants." Now it is obvious to any one reflecting on the subject that a franchise is a very different thing from a contract — although a franchise has within it the elements of a contract — a license or a privilege. The granting of a franchise is the act of a sovereign power. An old definition of it is that it "is a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and being derived from the crown must arise from the king's grant."²⁰ Franchises has been defined by the Supreme Court of the United States as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right."²¹ In a New York decision is both a definition and description of a franchise: "Franchises are privileges conferred by grant from government and vested in private individuals. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the parties to execute the conditions and duties prescribed in the grant."²² A gas company may be incorporated and its charter authorize it to make and sell gas, although it have no privilege to lay its pipes in the streets of the municipality where located; and yet it would possess a franchise granted by the sovereign State unaccompanied by any privilege of laying its pipes in the streets, and have no contract with the municipality to furnish it gas; and should it after receiving the privilege, enter into a contract to furnish public lights at so much per light; — the distinction between such a contract and the company's franchise is quite clear. Usually, if not universally, a gas company is organized under a general statute authorizing its incorporation and its articles of incorporation contain a statement of the place of its home office and where it will operate; unless it is

²⁰ Board v. People, 91 Ill. 80. 537, 579. See State v. Weatherby,

²¹ Bank of Augusta v. Earl, 13 45 Mo. 17; People v. Ridgely, 21
Pet. 519, 595. Ill. 65; Bridgeport v. New York,

²² Thompson v. People, 23 Wend. etc., R. R. Co., 36 Conn. 266.

chartered by a special act of the legislature, and then the field of its future operations is almost universally specified. Such a company has no right to enter upon the streets of a municipality without its consent to lay its pipes, unless its charter or some statute expressly gives it that privilege. Usually the act of incorporation and the grant of a right to use the streets are almost simultaneous acts; and out of their coincidence in point of time has grown up the confusion between a franchise and the grant of a right or privilege to occupy the streets. The two things are entirely different; and yet there is dire confusion about their natures in both the text books and the written opinions of the courts. The Supreme Court of Michigan has pointed out the distinction we are endeavoring to show. "The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise, and a similar power is used as often for private drainage and other purposes as for more general purposes. It is a matter peculiarly local in its character, and which should always be to a reasonable extent under a municipal supervision to prevent clashing among the many convenient uses to which ways must necessarily be subjected, for water, drainage and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a State franchise, but a mere grant of authority which, whether coming from private owners, or public agents, rests in contract or license, and in nothing else. It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements." ²³

²³ *People v. Mutual Gaslight Co.*, 38 Mich. 154. In this case leave to file an information in the nature of a *quo warranto* to have the charter of a gas company declared forfeited, because it had violated its contract with the city wherein it was located, was denied. In the same line see *Palestine Water, etc., Co. v. Palestine*, 91 Tex. 540; 44 S. W. Rep. 814; *Providence Gas*

Co. v. Thurber, 2 R. I. 15; 55 Am. Dec. 621. That it is a license or permit, see *Sandy Lake v. Sandy Lake, etc., Co.*, 16 Pa. Super. Ct. 234; *Great Falls W. W. Co. v. Great Northern Ry. Co.* (Mont.), 54 Pac. Rep. 963; *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; *Chicago R. R. Co. v. People*, 73 Ill. 541.

§470. Nature of grant to occupy streets or highways.— A franchise.

Notwithstanding the line of reasoning pursued in the foregoing section, some courts have held that the grant of a city to a gas company to occupy its streets with lines of pipes to furnish gas is something more than a mere license or privilege — it is a franchise. Chief among these is the New York Court of Appeals. In one case it was said: "At the threshold of the consideration of these questions, it will be well to have in mind the legal effect of the consent which the municipal authorities are authorized to give by the transportation corporation act. It operates to create a franchise, by which is vested in the corporation receiving it a perpetual and indispensable interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for the purpose, constitute the act upon which the law operates to create the franchise. The State might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances; but the tendency of later years, which is well grounded in reason, is for the State to confer upon the local municipal authorities the right to represent it in the matter of granting franchises to the extent that the final act necessary to the creation of franchises must be exercised by such authorities. The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest in the land."²⁴ In this same case it was conceded that, "The consent of the town authorities conferred upon the relator a franchise to carry on its business in the town, and to lay conductors in the streets and highways for the purpose of delivering gas; that such a franchise is property that cannot be destroyed or taken from it or renewed unless by the arbitrary act of the village authorities in refusing the

²⁴ *People v. Deehan*, 153 N. Y. 11 N. Y. App. Div. 175; 42 N. Y. 528; 47 N. E. Rep. 787, reversing Supp. 1071.

permit to place the conductors under the streets.”²⁵ It should be observed that in New York City, where this doctrine had its origin, the fee of the streets is in the City and not in the abutting property owner. In other States a similar rule has been adopted.²⁶

§471. Acceptance of grant.

In whatever way a grant may be regarded, whether as a gift, donation or a contract, it is not complete until accepted; and until it is accepted it may be revoked. Acceptance is essential to its validity.²⁷ Usually the ordinance granting the right requires the company to file with the municipality a written acceptance of the grant; but where no such requirement is exacted it is not necessary. An acceptance may be evidenced by acts alone. Thus where the grantee was required by the ordinance to commence furnishing gas within five years at specified rates; and within four months it purchased land on which to erect its works, and in nine months made contracts; it was considered that these acts, having been performed in good faith, constituted a sufficient acceptance, and it was too late thereafter to repeal the ordinance.²⁸ The acceptance must be of the exact terms of the grant; a qualified acceptance is invalid. Not only must the acceptance be as broad as the

²⁵ *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787. See also *People v. O'Brien*, 111 N. Y. 1; 18 N. E. Rep. 692; *Railroad Company v. Railroad Co.*, 32 Barb. 358, 364; *Brooklyn v. Jourdan*, 7 Abb. N. C. 23.

²⁶ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Palestine, etc., Co. v. Palestine*, 91 Tex. 540; 44 S. W. Rep. 814; *National Foundry, etc., Co. v. Oconto Water Co.*, 52 Fed. Rep. 29; *Sharp v. South Omaha*, 53 Neb. 700; 74 N. W. Rep. 76; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406; *Commercial, etc., Co. v. Tacoma*, 17 Wash. 661; 50 Pac. Rep. 592; *Joliet Gas-*

light Co. v. Sutherland, 68 Ill. App. 230.

²⁷ *Metropolitan Gas Co. v. Hyde Park*, 27 Ill. App. 361; affirmed 130 Ill. 42; 22 N. E. Rep. 616; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

The acceptance completes the contract. *Sandy Lake v. Sandy Lake, etc., Co.*, 16 Pa. Co. Ct. Rep. 234; *Morristown v. East, etc., Co.*, 115 Fed. Rep. 304.

²⁸ *Metropolitan Gas Co. v. Hyde Park*, 27 Ill. App. 361; affirmed 130 Ill. 42; 22 N. E. Rep. 616; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739; 35 S. E. Rep. 994; 50 L. R. A. 142.

grant, but when made it will be construed as an agreement to obey all the valid ordinances of the municipality in relation to the grant and its subject matter. Thus where a gas company was granted the privilege of laying its pipes in the streets of a city, subject to the conditions of a prior ordinance fixing the conditions generally on which a company could occupy streets with its pipes; and the company by resolution filed with the city agreed to comply with the general ordinance "excepting so far as any of the terms of said ordinance may be held or adjudged illegal or unreasonable by courts," it was held that as the city council had never consented to such qualifications of the acceptance, and the company having enjoyed the privileges of such ordinance under its acceptance, it could not refuse to comply with certain provisions of the ordinance on the ground that after its acceptance it had been adjudged to be void.²⁹ It is not necessary to name all of the sections of an ordinance in an acceptance, where an attempt is to accept it by sections; for the acceptance of a single section will carry with it an acceptance of all the provisions of the ordinance.³⁰ A mere nominal acceptance is sufficient to bind the company after it has enjoyed the whole or a part of the privileges granted.³¹

§472. Gas company must comply with conditions of grant.

A gas company that desires to retain its rights in the streets must substantially comply with the conditions of the grant; and if it fail to do so, it may forfeit its rights therein.³² The condition may be a precedent or a subsequent one. Thus where a natural gas company was required to have one or more gas wells in operation within a year as a condition precedent to the right to lay pipes in the streets, its right to lay such pipes

²⁹ *Allegheny v. People's, etc., Co.*, 172 Pa. St. 632; 26 Pittsb. L. J. 172 Pa. St. 632; 37 W. N. C. 442; (N. S.) 410; 37 W. N. C. 442; 33 Atl. Rep. 704.

³⁰ *Sewickley v. Ohio Valley Gas Co.*, 6 Pa. Co. Ct. Rep. 99, reversed but not on this point, 1 Monaghan, 97.

³¹ *Allegheny v. People's, etc., Co.*,

³² *Capital City Water Co. v. State*, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743; *Sandy Lake v. Sandy Lake, etc., Co.*, 16 Pa. Co. Ct. Rep. 234.

was held not to accrue until it had at least one well in operation and that within the year.³³ Where the condition was that the company must furnish gas within one year, it was held that the acquisition of a two-years' lease of gas-works was not a compliance with the condition, so as to enable the company, after the expiration of the year, to enjoin the town in its attempt to prevent it laying its own pipes in the streets; nor was the condition complied with by building a gas apparatus under cover, and withholding all knowledge of it from those who were to receive the company's advantages until the year specified had elapsed.³⁴

§473. Grant to occupy streets construed strictly.

Grants to occupy the streets of a city are strictly construed. As it is the use of public property for private gain, courts are careful to see that the rights of the public are protected; and also to see that the company receives nothing beyond what has been fairly granted. Nothing passes by implication except that which is necessary to carry into effect the grant.³⁵ In the New York case cited the court said: "The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute. It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but

³³ Newark Gas, etc., Co. v. Newark, 8 Ohio S. and C. P. Dec. 418; 7 Ohio N. P. 76.

³⁴ Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 27 Ill. App. 346. for last proposition.

³⁵ People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; State v. Boyce, 43 Ohio St. 46; 1 N. E. Rep. 17; Pensacola Gas Co. v. Pensacola, 33 Fla. 322; 14 So. Rep. 826; Tampa v. Tampa W. W. Co. (Fla.) 34 So. Rep. 631.

imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations."³⁶

§474. What streets company may occupy.— Sidewalk.

Where the ordinance granting the gas company the right to furnish gas to a municipality designates the streets it may occupy, it necessarily follows that it can occupy no other streets than those named without a further permit from the municipality, unless it has a charter which gives it the absolute right to occupy the streets without consent of municipal authorities. But if an ordinance gives it the right to occupy the streets, and is silent as to what streets, then the company can make its own selection; and it cannot be successfully urged that the ordinance is void.³⁷ As the sidewalks are a part of the street, a city may authorize a gas company to lay its gas mains therein.³⁸

§475. Territory annexed to another municipality after grant made.

If a gas company is given authority to occupy the streets of a municipality; and thereafter a part of the territory of such municipality is cut off and annexed to another or erected into a new and separate municipality, the company has the right to continue in the use of the part so cut off, and even to occupy

³⁶ See Appeal of Pittsburg, 115 Pa. St. 4; 7 Atl. Rep. 778; Western Paving, etc., Co. v. Citizen's, etc., Co., 128 Ind. 525; 26 N. E. Rep. 188; 28 N. E. Rep. 88.

³⁷ Kalamazoo v. Kalamazoo, etc., Co., 124 Mich. 74; 82 N. W. Rep. 811.

³⁸ McDivitt v. Philadelphia Gas Co., 160 Pa. St. 367; 28 Atl. Rep. 948.

In Pennsylvania a gas or other public company, in the application,

must specify the territory it desires to occupy. *In re Conshohocken Gaslight Co.*, 5 Pa. Co. Ct. Rep. 585.

A statute requiring a company to state in its application what streets it desires to occupy is complied with by a general designation of all the streets of the city. *Myers v. Hudson, etc., Co.* (N. J.), 44 Atl. Rep. 713, reversing 37 Atl. Rep. 618.

new streets opened up in that part of the territory so severed from the old municipal corporation.³⁹

§476. New streets, right to occupy.— No streets specified.

If a gas company be given the right generally to supply gas to a municipality and to occupy its streets for that purpose, it has the right to occupy streets opened therein after the grant, as well as streets laid out in new territory.⁴⁰ Thus where the grant was the "power of laying conductors for conducting gas in and through the public streets and highways of the town," it was held that the grant was co-extensive with the limits of the town, and was not confined to any particular street, highway, or other local division. The lower court held that the grant did not apply to streets not open when the grant was made; but its holding was reversed on appeal, the Appellate Court saying: "It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation or at least for a long period of time, and should be given effect according to its nature, purpose, and duration. There is no good reason for restricting its operation to existing highways, unless that purpose appears from the language employed. It is not claimed that any such limitation was expressed, and none can be implied from the nature of the case. The language of consent confers the right to place the conductors in the streets, upon compliance with all reasonable regulations, not only as the streets then existed, but as subsequently enlarged. That is

³⁹ *People v. Deehan*, 153 N. Y. 11 N. Y. App. Div. 175; 42 N. Y. 528; 47 N. E. Rep. 787; reversing Supp. 1071.

⁴⁰ See Sec. 475.

what the grant contemplated when made, and such is the fair meaning of the language used.”⁴¹

§477. Sale or assignment of right in streets.

If the right to lay pipes in a street to supply gas or water be regarded as a franchise, then under the general principles of corporation law the right cannot be assigned, unless a statute authorizes it.⁴² But if the right be regarded as a mere easement, license or privilege, then it may be assigned, unless the ordinance containing the grant forbid it.⁴³ The assignment does not prevent the grantor or the State, having a forfeiture declared in the hands of the assignee, even for acts of the assignor.⁴⁴ A gas company cannot lease its plant without the consent of the municipality.⁴⁵ The city or town may agree that the grant may be assigned; and a grant to the company or its assigns is sufficient to authorize an assignment without the farther consent of the city.⁴⁶ Where the sale and assignment

⁴¹ *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

For the right of a company to cross unimportant streets without a permit, in order to complete its system, see *National Gas Co. v. Pittsburg*, 1 Pa. Co. Ct. Rep. 311.

⁴² *Thomas v. Railroad Co.*, 101 U. S. 71; *York, etc., R. R. Co. v. Winans*, 17 How. 30; *Black v. Delaware, etc., R. R. Co.*, 22 N. J. Eq. 130; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Chicago Gaslight and Coke Co. v. People's etc., Co.*, 121 Ill. 530; 13 N. E. Rep. 169; 2 Am. St. Rep. 124; reversing 20 Ill. App. 473; *Brunswick Gaslight Co. v. United, etc., Co.*, 85 Me. 532; 27 Atl. Rep. 525; 35 Am. St. Rep. 385.

As for an instance not amounting to an assignment or lease, see *Marlborough Gaslight Co. v. Neal*, 166 Mass. 217; 44 N. E. Rep. 139.

⁴³ *Commercial, etc., Co. v. Tacoma*, 17 Wash. 661; 50 Pac. Rep. 592; *Joliet Gaslight Co. v. Sutherland*, 68 Ill. App. 230; *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789; *In re Southern Illuminating Co.*, 5 Pa. Dist. Rep. 781.

⁴⁴ *City Water Co. v. State (Tex.)*, 33 S. W. Rep. 259.

⁴⁵ *Visalia Gas, etc., Co. v. Sims*, 104 Cal. 326; 37 Pac. Rep. 1042; *Bath Gaslight Co. v. Claffy*, 74 Hun 638; 26 N. Y. Supp. 287.

⁴⁶ *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558; 20 Sup. Ct. Rep. 736; *American Water Works Co. v. Farmers' Loan and Trust Co.*, 73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563; *San Luis Water Co. v. Estrada*, 117 Cal. 168; 48 Pac. Rep. 1075; *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383.

of a franchise is permitted, the purchaser or assignee succeeds to all the rights and privileges of the assignor, even to the extent of excluding all other companies where the franchise assigned is of that character; ⁴⁷ and assumes all its burdens, even to the extent of furnishing the city free gas when that privilege is contained in the original contract.⁴⁸ And the city, consenting to the assignment if that is necessary, is bound to carry out with the assignee its agreements made with the assignor.⁴⁹

§478. Change of use of franchise.— Natural gas.

A gas company cannot use its powers for any purpose than those specified in its franchise; and it cannot use the streets for any other purpose than those named in the contract with the municipality. Illustrations of this have been given in discussing the question of exclusive franchises or monopolistic contracts. In the construction of special legislative grants all doubts are to be construed against the grantee, and liberally in favor of the public.⁵⁰ As has been stated, an exclusive franchise to maintain a horse car line is not violated by the grant of a franchise to maintain a car line by the use of electricity.⁵¹ Nor does an exclusive franchise to furnish light by gas prohibit the introduction of public electric lights by another company.⁵² So a statute upon the subject of gas, enacted long before natural gas came into use in the State, has no reference to natural

⁴⁷ *South Side Gas Co. v. Southern, etc., Co.*, 18 Pa. Co. Ct. Rep. 529.

⁴⁸ *Sandy Lake v. Sandy Lake, etc., Gas Co.*, 16 Pa. Supr. Ct. Rep. 234; *Freeport v. Enterprise Natural Gas Co.*, 18 Pa. Supr. Ct. 73.

⁴⁹ *Austin v. Bartholomew*, 107 Fed. Rep. 349; 46 C. C. A. 327.

⁵⁰ *State v. Payne*, 129 Mo. 468; 31 S. W. Rep. 797; 33 L. R. A. 576; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24; 11 Sup. Ct. Rep. 478; *Town-*

send v. Brown, 24 N. J. L. 80; *Black v. Delaware, etc., Co.*, 24 N. J. Eq. 455, 474; *Tampa v. Tampa W. W. Co. (Fla.)*, 34 So. Rep. 631.

⁵¹ *Omaha, etc., Co. v. Cable, etc., Co.*, 30 Fed. Rep. 324.

⁵² *Newport v. Newport Light Co.*, 11 Ky. L. Rep. 840; 12 S. W. Rep. 1040; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep. 650. Nor may the gas company furnish electricity. *State v. Murphy*, 170 U. S. 78; 18 Sup. Ct. Rep. 505.

gas.⁵³ The natural conclusion from these cases to be drawn is that a gas company given the privilege to use the streets in order to furnish gas for public lighting cannot furnish electricity for light. Such in fact is the case. So a like conclusion is reasonably reached that a company given the privilege of the streets to lay pipes therein in order to furnish artificial gas cannot use such pipes in order to supply natural gas; and so it is decided.⁵⁴ Keeping in mind the strict construction and the cases already cited, it seems to be a rational conclusion that an artificial gas company having its pipes in the streets cannot use them for the purpose of supplying natural gas; and a natural gas company cannot use its pipes to supply artificial gas. Nor is it going beyond the legitimate course of reasoning from the decided cases to say that a company given a franchise to furnish gas for light, and the right to use the streets for that purpose, cannot use such streets to supply gas for heating purposes. It makes no difference that the gas belongs to the consumer as soon as it has passed through the meter (when meters are used), and the company thereafter has no control over it; for it is the use of the street in the transportation of the gas that is perverted. The grant is for the purpose of transporting gas for the purposes of light and not for heat; and whenever the company connives at the use of the gas so transported it vio-

⁵³ Warren Gaslight Co. v. Pennsylvania Gas Co., 10 Pa. Ct. Rep. 310; affirmed 161 Pa. St. 510; 29 Atl. Rep. 101.

⁵⁴ Findlay Gaslight Co. v. Findlay, 2 Ohio Cir. Ct. Rep. 237; 1 Ohio Cir. Dec. 463; Kentucky Heating Co. v. Louisville Gas Co. (Ky.), 63 S. W. Rep. 651; 23 Ky. L. Rep. 730.

The Pennsylvania corporation act of 1874, or the incorporation of gas companies, contemplates only companies supplying the manufactured product, and does not authorize the creation of a corporation to supply

natural gas. Emerson v. Commonwealth, 15 W. N. C. 425; 108 Pa. St. 111; Sterling's Appeal, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 40. But where a corporation was formed to supply gas for light, or heat, or both, and for other purposes, and its charter made no restrictions as to uses, it was held that it could supply natural gas for lighting, unless some other company had the exclusive right to do so. Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.) 229.

lates the privileges extended to it, and under cover of one privilege is insisting on another.⁵⁵

§479. Ordinance void.— Estoppel.

If the ordinance granting the right to occupy the streets be void, yet if the company accept it, perform all its requirements, by constructing its works and laying its mains, the municipality will be estopped to set up that the company is in the streets without right; and if it has a contract with the municipality to furnish gas, has furnished it and received pay in part, the latter will also be estopped to set up that such contract is void.⁵⁶

⁵⁵ See Warner Gaslight Co. v. Pennsylvania Gas Co., 161 Pa. St. 510; 29 Atl. Rep. 101; Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. L. J. (N. S.) 229; Lebanon Gas Co. v. Lebanon Fuel, etc., Co., 5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223. A contract to supply natural gas for heat is not one to furnish it for light. Philadelphia Gas Co. v. Park Bros., 138 Pa. St. 346; 22 Atl. Rep. 86. See Johnston v. People's, etc. Gas Co. (Pa.), 7 Atl. Rep. 167; 5 Cent. Rep. 564.

In Pennsylvania a single corporation cannot be chartered to manufacture and supply gas and also to supply heat by means other than gas (nor to portions of two counties). New Gaslight Co., 7 Pa. Dist. Rep. 151; 1 Dauph. Co. Rep. 22. But see Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co., 4 Kulp. 47.

A charter for the manufacture and supply of gas generally does not conflict with a prior franchise for the manufacture and supply of gas for light only, but carries with it no authority to supply gas for light. *In re Philadelphia Gas Works*, 1 Dauph. Co. Rep. 55; *In re Charter of Gas Companies*, 18 Pa. Co. Ct.

Rep. 136; 5 Pa. Dist. Rep. 396. See Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. Rep. 662.

A corporation under a special Act chartered to build works which may improve trade, may engage in the production and delivery of natural gas. Carother's Appeal, 118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48.

⁵⁶ Illinois Trust, etc., Bank v. Arkansas City, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518. See *Morristown v. East, etc., Co.*, 115 Fed. Rep. 304.

A statute prohibiting a town entering into a contract for public lights, but no contract should go into operation until authorized by a vote of its inhabitants, does not prevent it entering into such a contract with a company duly organized by a vote of such inhabitants without another vote. *Lima Gas Co. v. Lima*, 4 Ohio Cir. Ct. Rep. 22; 22 Wkly. L. Bull. 272; 2 Ohio Cir. Dec. 396.

Vetoing an ordinance after the time allowing a veto will not annul a contract made under it. *Pennsylvania Globe Gas Co. v. Scranton*, 97 Pa. St. 538.

§480. Gas company occupying streets is subject to municipal regulations.

A gas company occupying the streets of a municipality is subject to the reasonable rules and regulations of such municipality with reference to its opening and use of its streets; and it makes no difference whether such company has the right to occupy such streets without the consent of the municipality or not. The rules and regulations must of course be reasonable.⁵⁷ Usually requirements with reference to opening streets and laying pipes therein are inserted in the grant to the gas company; frequently they are in general ordinances in force at the time of the grant, and occasionally in the statutes of the State. In whatever phase they are presented, they must be obeyed by the company. In fact, there is nothing to prevent the municipality adopting such regulations after the grant to a company has been made, so long as they are reasonable, which are necessary for the protection of property and of the public, having a due regard for the rights of the company. Thus, it is a frequent requirement, one almost universally required, that the trenches in a street in which the pipes are laid shall be filled so as to leave the streets in as good a condition as they were before such trenches were opened; and under such an agreement a municipality has the right to insist on the work being done under such reasonable conditions and restrictions as shall make it certain that the work will be properly done.⁵⁸

If a gas company enter on the streets under a void ordinance, and occupy them with its pipes and mains, it cannot set up that the grant is void. *Sandy Lake v. Sandy Lake, etc., Co.*, 16 Pa. Super. Ct. Rep. 234.

⁵⁷ *Reading v. Consumers' Gas Co.*, 2 Del. Co. Rep. (Pa.) 437; *Benton v. Elizabeth*, 61 N. J. L. 693; 40 Atl. Rep. 1132, affirming 39 Atl. Rep. 683; *Appeal of City of Pittsburgh*, 115 Pa. St. 4; 7 Atl. Rep. 778; *Heman v. St. Louis, etc., Co.*, 75 Mo. App. 372; *Kalamazoo v. Kalamazoo, etc., Co.*, 124 Mich. 74;

82 N. W. Rep. 811; *State v. Murphy*, 170 U. S. 78; 18 Sup. Ct. Rep. 505; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957; *Palestine, etc., Co. v. Palestine*, 91 Tex. 540; 44 S. W. Rep. 814; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; *Traverse City Gas Co. v. Traverse City (Mich.)*, 89 N. W. Rep. 574; *In re Johnston*, 137 Cal. 115; 69 Pac. Rep. 974.

⁵⁸ *Kalamazoo v. Kalamazoo, etc., Co.*, 124 Mich. 74; 82 N. W. Rep. 811.

The regulations, although adopted subsequent to the date of the grant, may relate to the manner of laying the pipes, altering, inspecting, and repairing them, and the character thereof with respect to the safety of the public and its convenience, of course not contravening any statute.⁵⁹ The grant may require the pipes to be laid a certain distance below the surface of the street; but if that depth should conflict with the open sewers and the flow of the water in them, then that fact must be taken into consideration; and if the city reserves the right for its council to determine where the pipes of a water company shall be located, and to employ an engineer to see that the water works are so constructed as to properly protect the interests of the city, that does not confer on the engineer employed power to determine the location of the pipes. In such an instance, if the company locate and put in its pipes without any determination or direction of the council as such, its adoption of the plans of the engineer in no wise changes its responsibility.⁶⁰ If the contract with the company be that the pipes, even on private land, shall be "well and sufficiently closed up," and the land and premises be "made good," it is not a compliance with such contract to leave the soil covering the pipes in the trenches in places from two to two and a half feet above the original level.⁶¹ A municipality may adopt an ordinance to prohibit gas companies laying pipes in the streets during the winter months, so as to prevent the streets becoming obstructed.⁶² If

⁵⁹ Appeal of City of Pittsburg, 115 Pa. St. 4; 7 Atl. Rep. 778; *Heman v. St. Louis etc., Co.*, 75 Mo. App. 372; *Benton v. Elizabeth*, 61 N. J. L. 693; 40 Atl. Rep. 1132, affirming 39 Atl. Rep. 683.

⁶⁰ *Montgomery v. Capital City Water Co.*, 92 Ala. 361; 9 So. Rep. 339.

⁶¹ *Chisholm v. Halifax*, 29 Nov. Sco. 402.

In this case it was also held that putting stones in the trenches so that they interfered with plowing the ground was not a breach of the contract.

Where an ordinance required repairs to be made within a specified time after notice given by the city to make them; and upon receiving such a notice work was begun within two days thereafter and prosecuted with due diligence, but not completed until the day after the time for completing the work had expired, it was held that there was a compliance with the requirements of the ordinance. *Heman v. St. Louis etc., Co.*, 75 Mo. App. 372.

⁶² *North Liberties v. North Liberties Gas Co.*, 12 Pa. St. 318.

there be a general ordinance in force, when the right to occupy the streets is granted, providing that all pipes laid in the streets should be laid a certain depth, and under the supervision of the street commissioners; and such grant is expressly made subject to all ordinances then or thereafter in force, such pipes must be laid under the supervision of such street commissioners.⁶³ An ordinance granting the right to lay and maintain pipes in the streets, reserving their location to the common council, does not mean when the location has once been determined upon and fixed that the municipality has exhausted its power in that respect and has no further power to regulate and change the location.⁶⁴ In its regulations all companies must be treated alike; and one cannot be denied privileges granted others. Thus where an ordinance required a special permit of the board of supervisors before poles for electric lighting could be erected in the streets, and a permit was issued to one company and denied to another, it was said that the latter company could maintain an action for a mandamus to compel the issuance to it of a proper permit, but it was also said that it could not enjoin the other company from erecting its poles.⁶⁵ But mandamus will not lie to compel a city to grant permits to lay wires in a street, where the company by virtue of its charter claims the right to lay them without complying with reasonable police regulations on the subject adopted by the city, such company not having offered to comply with them.⁶⁶

⁶³ *Wilkinsburg Gas Co. v. Wilkinsburg*, 25 Pitts. L. J. (N. S.) 42.

A company having its pipe line, although occupying a private right of way, to transport oil through land which is traversed by a public street of a city, is subject to an ordinance prescribing the manner in which the pipe shall be laid and used. *Benton v. Elizabeth* 61 N. J. L. 693; 40 Atl. Rep. 1132; affirming 39 Atl. Rep. 683.

⁶⁴ *Montgomery v. Capital, etc.*, Co., 92 Ala. 361; 9 So. Rep. 339.

⁶⁵ *Mutual Electric Light Co. v.*

Ashworth, 118 Cal. 1; 50 Pac. Rep. 10. See also *State v. St. Louis*, 145 Mo. 551; 46 S. W. Rep. 981, where mandamus was held the proper writ to compel the granting of certain permits to a company already occupying the streets. In this case it was held that an ordinance was not void because it did not reserve to the city control over the works or business of the company or require it to serve the public.

⁶⁶ *State v. Murphy*, 170 U. S. 78; 18 Sup. Ct. Rep. 505.

Where the constitution of a State

§481. Injunction to protect company's rights in streets.

If a company has been properly granted the privilege to use the streets of a city — or has been granted a franchise in such streets, as is usually said — a court of equity will protect its rights by an injunction.⁶⁷ But where a municipality is not empowered to grant an exclusive franchise, a gas company with the grant of such a right cannot obtain an injunction to restrain another company obtaining a subsequent grant of the right to occupy the same streets.⁶⁸

§482. Grant before company is organized.

It is no objection to the grant to a gas company of a right to lay pipes in the streets that it was made before the company was incorporated, if it, after its organization, accept the ordinance and enter upon the work of laying pipes before objection was made.⁶⁹

§483. Length of grant of franchise.

Unless the charter or a statute fixes a limit, or the contract with the city determines it, the length of time a gas company

gives corporations the right to lay gas mains or water pipes in the streets of municipal corporations, under the direction of the superintendent of streets, such municipalities cannot adopt an ordinance requiring a corporation to first obtain a permit before laying its pipes in the streets, the exercise of such authority not being an exercise of the police power. *In re Johnston*, 137 Cal. 115; 69 Pac. Rep. 973.

A city may require a gas company to lay its pipes in the alleys whenever practicable if ordered by its council, under a clause in a statute empowering such city to impose reasonable regulations upon gas companies using its streets. *Traverse City Gas Co. v. Traverse City* (Mich.), 89 N. W. Rep. 574.

A city may require water mains to be removed and placed elsewhere, when no longer needed in the place where they are located. *Asher v. Hutchinson Water, etc., Co.*, 71 Pac. Rep. 813.

⁶⁷*Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Natural Gas Co. v. Pittsburg*, 1 Pa. Co. Ct. Rep. 311; *Goodson v. Richardson*, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337.

⁶⁸*Coffeyville, etc., Co. v. Citizens', etc., Co.*, 55 Kan. 173; 40 Pac. Rep. 326.

⁶⁹*Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739; 35 S. E. Rep. 994; 50 L. R. A. 142; *Sharp v. South Omaha*, 53 Neb. 700; 74 N. W. Rep. 76. See *People v. Bowen*, 30 Barb. 24.

may maintain its pipes in the streets is unlimited;⁷⁰ and such limitation cannot be shortened by subsequent legislation. The grant of the right is in perpetuity;⁷¹ and such is the presumption.⁷²

§484. Termination of life of corporation before expiration of franchise.

Strictly speaking, a franchise expires with the corporation; but instances have occurred where grants of rights and privileges have been made to gas companies for a length of time that exceeded its corporate life; and some difficulties have arisen on that score. In an instance of that kind an ordinance was held not to be void. In the instance referred to the grant was to the company or its assigns; and the ordinance provided that the company might transfer all of its rights, privileges, property and franchise conferred by it to any organized gas company which should, within twenty days after the transfer, file its written acceptance of the ordinance's terms and give bond for the performance of all the agreements required of the original company. The grant extended beyond the limit of the corporate existence; but the contract with the city was upheld.⁷³ But such an ordinance cannot prolong the life of the corporation, it being construed as a valid contract only so long as the company has a corporate existence, as fixed by the statute or original articles of incorporation.⁷⁴

§485. Consolidation of gas companies.

Statutes may authorize two or more gas companies to consolidate; and when consolidated the new companies become vested with all the rights of the consolidating companies, and

⁷⁰ *People v. Deenan*, 153 N. Y. 528; 47 N. E. Rep. 787; 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

⁷¹ *People v. O'Brien*, 111 N. Y. 1; 18 N. E. Rep. 692.

⁷² *Suburban Electric Light, etc., Co. v. East Orange* (N. J. Ch.), 41 Atl. Rep. 865.

⁷³ *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789.

⁷⁴ *State v. Payne*, 129 Mo. 468; 31 S. W. Rep. 797; 33 L. R. A. 576.

become bound by all the duties and obligations imposed on them by the statute or by the several ordinances granting them rights to furnish the municipality and its inhabitants with gas.⁷⁵ But a statute authorizing a consolidation of two or more companies does not authorize an existing company to consolidate with a company of individuals not yet incorporated as a company.⁷⁶ The ordinance by which a company is authorized to occupy the streets may be such as to forbid a consolidation with another company. Thus where the grant was upon the condition that the company would not enter into any combination with another company with respect to rates to be charged for gas, it was held that an agreement with another company in the city for a division of the territory to be lighted was a violation of the condition in the ordinance, although not such a breach as to work a forfeiture of the right to lay pipes in the streets named in the grant.⁷⁷ An agreement of two gas companies to divide the territory between them, where their respective grants cover the same ground and not to invade each other's separate territory is void, because of public policy.⁷⁸

§486. Town becoming a city.

If a town has authorized a gas company to occupy its streets with its pipes, and has entered into a contract with it for gas, and afterwards becomes a city, the right of the company to occupy such streets is not affected by the change, nor is the contract annulled. In other words, the succession of one municipality to the territory of another does not change the rights of an existing gas company in the territory.⁷⁹

⁷⁵ *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406. See *Bailey v. Citizens' Gaslight Co.*, 27 N. J. Eq. 196.

⁷⁶ *New Orleans, etc., Co. v. Louisiana, etc. Co.*, 11 Fed. Rep. 277.

⁷⁷ *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594; 5 N. W. Rep. 1039.

⁷⁸ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *Chicago Gaslight and Coke Co. v.*

People's Gaslight and Coke Co., 121 Ill. 530; 13 N. E. Rep. 169; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69.

⁷⁹ *People v. Deehan*, 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071; reversed 153 N. Y. 528; 47 N. E. Rep. 787; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; 33 N. W. Rep. 749.

§487. Injunction to restrain laying of pipes in streets.

It has been held that the laying of pipes in the street is not such a nuisance as will authorize a court of equity to restrain the persons laying them.⁸⁰ But this was a suit brought by an abutting property owner who did not own the fee in the street, and the obstruction of the street would last only two or three days.⁸¹ But where there is an invasion of private grounds adjoining the street, an injunction will be granted upon proper application.⁸² Of course, a municipality may always maintain a suit to prevent a gas company invading its streets and laying down pipes therein without its or the State's consent;⁸³ and so may a private land owner whenever the gas pipes will be an additional burden on the fee of the highway.⁸⁴

§488. Pipe laid in street unlawfully laid out.

If a pipe line be laid in a street which has been unlawfully laid out, and the proceedings laying it out are declared void and set aside, because of the unconstitutionality of the statute authorizing its laying out, the owner of the pipe will not lose it nor can he be deprived of its use by the abutting land owner, if no question concerning the validity of the law was raised at the time the lands were taken for the purpose of a street.⁸⁵ The laying out of the street in such a case will be regarded the

⁸⁰ *Attorney General v. Cambridge Consumers' Gas Co.*, L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145, overruling L. R. 6 Eq. 282; 38 L. J. Ch. 94, 111; 17 W. R. 145; 17 Gas. Jr. 427, 593, 867.

⁸¹ Decision to the same point. *Attorney General v. Sheffield Gas Consumers' Co.*, 3 De. Gex. McN. and G. 304; 17 Jur. 677; 22 L. J. Ch. 811; 2 Gas. J. 396, 419; 19 E. L. and Eq. 639; 1 W. R. 185. Otherwise if he owned the fee. *Goodson v. Richardson*, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; 1 Deere v. Guest, 1 My. and C. 516; 6 L. J. Ch. 69.

⁸² *Chapman v. Crays' Gas Co.*, 13

Gas. J. 448. Where an action for damages would furnish adequate relief, an injunction was refused. *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19.

⁸³ *Brooklyn v. Fulton Municipal Gas Co.*, 7 Abb. N. C. 19.

⁸⁴ *Goodson v. Richardson*, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; *Selby v. Crystal, etc., Co.*, 4 DeG. F. and J. 246; 31 L. J. Ch. 595; 8 Jur. (N. S.) 830; 6 L. T. (N. S.) 700; 10 W. R. 636.

⁸⁵ *King v. Philadelphia Co.*, 154 Pa. St. 160; 26 Atl. Rep. 308; 21 L. R. A. 141; 41 Am. and Eng. Corp. Cas. 221.

same as if a street that could be lawfully laid out had been laid out by *de facto* officers.

§489. Revocation of grant.

The grant of a privilege, license or franchise, by whatever name it may be called, to occupy the streets of a municipality with gas pipes, for the purpose of supplying the public with gas, vests such a right in the gas company that the municipality cannot revoke or deprive it of such grant, unless it, by its course of action, has laid itself liable to a decree of forfeiture. The grant, when accepted, and especially after its terms have been complied with, becomes a contract protected by the Federal Constitution.⁸⁶ The only way it can be deprived of such a grant is for cause, and by due legal process.⁸⁷ "The privilege of the use of the public streets of a city or town, when granted by ordinance, is not always a mere license, and revocable at the pleasure of the municipality granting it; for if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract. And the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust."⁸⁸ Such an ordinance cannot be repealed.⁸⁹

⁸⁶ *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 6 Sup. Ct. Rep. 265; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 553; *People's Gaslight Co. v. Hale*, 94 Ill. App. 406; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957; *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; *Southwest Missouri Light Co. v. Joplin*, 113 Fed. Rep. 817.

⁸⁷ *People v. Deehan*, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

⁸⁸ *Chicago, etc., Co. v. Lake*, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; *Illinois Trust, etc., Bank v. Arkansas City*, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518; *State v. Laclede Gaslight Co.*, 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789.

⁸⁹ *People v. Kent* (Ill.), 12 Nat. Corp. Rep. 193.

Notice of an intention to revoke its rights to the streets must be given to a gas company before the revocation takes place. *Jersey City, etc., Co. v. Passaic* (N. J. L.), 52 Atl. Rep. 242.

§490. Forfeiture of right to occupy streets for failure to perform duty.

There is no doubt of the right of a city to enforce a forfeiture of the right of a gas company to occupy its streets with its pipes on a continued failure to comply with its agreement. A single instance of failure would not, of course, be sufficient, although it might give a right of action to recover damages; but a continued failure will be. An illustration of this can be found in the case of a water company, where the court was of the opinion that a city might enforce a forfeiture for a continued failure to supply wholesome water in a sufficient quantity, even independent of a provision in the contract and ordinance that the exclusive franchise granted should be forfeited for such cause.⁹⁰ A promise on the part of the company to do better in the future is no defense.⁹¹

§491. Actions to declare forfeiture.— Quo warranto.

There is not such a uniformity in the decisions with reference to the enforcement of a forfeiture of a franchise because

⁹⁰ Palestine Water, etc., Co. v. Palestine, 91 Tex. 540; 44 S. W. Rep. 814; affirming 41 S. W. Rep. 659.

See where the word "pure" in a statute was construed to be "wholesome" with respect to water. Commonwealth v. Towanda Water Works (Pa.), 15 Atl. Rep. 440. Sand in water damaging elevators, liability to damages. Scottish, etc., Co. v. Toronto, 24 Ont. App. 208.

⁹¹ Capital Water Co. v. State, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743.

The owner of a franchise to lay pipes in the streets of a city, contracted with another to form a gas company, the owner to furnish the franchise and the other to furnish all the money to build the

plant and lay the pipes. After such other person had laid some of the pipes, he abandoned the work. It was held that since the pipes had become attached to the casement belonging to its owner, such owner became the owner by reason of the abandonment, and such other person had lost all rights in the pipes. Joliet Gaslight Co. v. Sutherland, 68 Ill. App. 230. The same line of reasoning would lead to the conclusion that the gas company would also lose its rights to remove its pipes, if it was to abandon the enterprise before its completion; and perhaps where a forfeiture was declared. *Quære*, if such were the case, would the city or abutting property owners become the owners of the pipes?

of a violation of a contract with a municipality as is desirable. In Michigan a petition for leave to file an information in the nature of a *quo warranto* to declare a forfeiture of a franchise of a gas company, on the ground that it had failed to keep its contract with the city was refused; the court declaring that the right under the contract to occupy the streets with gas pipes was a mere license, and one in which the State had no concern, its violation being merely a matter between the company and the city.⁹² A similar decision was made in New York.⁹³ But there are a number of instances where it is held that the State may bring the suit to have the charter declared forfeited because of a persistent violation of the company's contract with the city.⁹⁴ In one case it was also held that the fact of the city having the power to proceed against the company for infractions of its duty, which was enforced by its charter and the contract, was not a bar to the State to bring an action because of such infractions.⁹⁵ And the reverse of this was held where the city brought the suit to amend the contract because of the violation of its terms.⁹⁶ No doubt the State may bring an action to have a forfeiture declared in all those instances where the company is guilty of a violation of the laws of the State, aside from the violation of its contract with or grant from the municipality; for such is a violation of the general corporation laws.⁹⁷ Such is an instance where a statute fixes the price at which gas must be supplied;⁹⁸ or where it has usurped the exclusive privilege of furnishing gas in a city in

⁹² *People v. Mutual Gaslight Co.*, 38 Mich. 154.

⁹³ *People v. Bowen*, 30 Barb. 24; affirmed 21 N. Y. 517.

⁹⁴ *Capital City Water Co. v. State*, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743; *Commonwealth v. Towanda Water Works (Pa.)*, 15 Atl. Rep. 440; *State v. Janesville, etc., Co.*, 92 Wis. 496; 66 N. W. Rep. 512.

⁹⁵ *Capital City Water Co. v. State*, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743.

⁹⁶ *Palestine Water, etc., Co. v. Palestine*, 91 Tex. 540; 44 So. W. Rep. 814; affirming 41 S. W. Rep. 659.

⁹⁷ *State v. Cincinnati, etc., Co.*, 18 Ohio St. 262; *State v. Columbus, etc., Co.*, 34 Ohio St. 572; *State v. New Orleans, etc., Co.*, 2 Rob. (La.) 529; *Wandsworth, etc., Co. v. Wright*, 19 Gas. J. 407; 18 W. R. 728.

⁹⁸ *State v. Columbus, etc., Co.*, *supra*.

violation of a statute.⁹⁹ The State may, however, by its conduct or acquiescence be estopped to question the right of the company to continue as a corporation; especially so where the illegal acts took place long time before — as eight years for instance — and where some of the present stockholders were guilty of abetting such violation.¹⁰⁰ A pretended sale of all the company's property will not deprive the State of its right to forfeit its charter, even in the hands of the vendee, for a failure to perform a corporate duty.¹⁰¹

§492. Waiver of right to declare forfeiture.

By its course of conduct a municipality may waive its right to declare a forfeiture for failure to comply with the terms of a contract, just as it may be estopped to have a void contract set aside. Thus where a city in an ordinance granting a franchise provided that if certain things should not be done within fifteen months the company should forfeit its rights, it was considered that the city had waived any forfeiture by recognizing the ordinance in force after the fifteen months, by maintaining its own wires upon the electric company's poles, in assessing and collecting taxes on the franchise granted, and in failing to set up a claim of forfeiture in a number of suits brought by the company against it to enforce certain rights given by the contract.¹⁰²

§493. Changing grade of street.

The fact that a contemplated change of the grade of a street will interfere with the gas company's pipes does not prevent the

⁹⁹ *State v. Milwaukee Gaslight Co.*, 29 Wis. 454.

¹⁰⁰ *State v. Janesville Water Power Co.*, 92 Wis. 496; 66 N. W. Rep. 512.

¹⁰¹ *City Water Co. v. State*, 88 Tex. 600; 32 S. W. Rep. 1033; 33 S. W. Rep. 259.

A violation of an injunction against the enforcement of unreasonable rules is not sufficient to

authorize a decree of forfeiture, although it may be grounds for contempt proceedings. *Newark v. Newark W. W. Co.*, 4 Ohio N. P. 341; 6 Ohio Dec. 518.

¹⁰² *Commercial, etc., Co. v. Tacoma*, 17 Wash. 661; 50 Pac. Rep. 592. See *Walla Walla v. Walla Walla Water Co.*, 172 Fed. Rep. 1; 19 Sup. Ct. Rep. 77, affirming 60 Fed. Rep. 957.

change, nor lay the city liable for damages to the company occasioned thereby. Nor is the city liable to the company for the expense incurred in lowering or otherwise changing its pipes so as to conform to the new grade.¹⁰³ Nor can the gas company impose upon adjacent lot owners, the expense it has incurred in taking up and relaying its pipes, required by a change of grade; it must make such changes at its own cost.¹⁰⁴ If it is necessary to place drainage pipes or sewers in the street, the municipal authorities may compel the company to raise or lower its pipes, if such action be necessary to secure a proper location for them.¹⁰⁵ Under a statutory power to contract for lighting of its streets upon such terms and conditions as it shall deem expedient, a city is empowered to agree, in the original grant of a franchise, that it will reimburse the gas company for all damages occasioned it by a change in the grade of a street.¹⁰⁶

§494. Tearing up streets.—Obstructions.—Indictment.

No one can open streets and lay down pipes with which to supply the inhabitants of the municipality with gas or water unless authorized so to do. If he do so, without proper authority he is subject to indictment and punishment.¹⁰⁷ If a

¹⁰³ *Belfast Water Co. v. Belfast*, 92 Me. 52; 42 Atl. Rep. 235; *Columbus, etc., Co. v. Columbus*, 50 Ohio St. 65; 33 N. E. Rep. 292; 19 L. R. A. 510; *Jamaica Pond, etc., Co. v. Brookline*, 121 Mass. 5; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810; 14 S. E. Rep. 665; *Brenham v. Brenham Water Co.*, 67 Tex. 543; 4 S. W. Rep. 143; *National W. W. Co. v. Kansas City*, 20 Mo. App. 237; *National W. W. Co. v. Kansas City*, 28 Fed. Rep. 921; *Rockland W. W. Co. v. Rockland*, 83 Me. 267; 22 Atl. Rep. 166.

¹⁰⁴ *In re Deering*, 93 N. Y. 361; *Pocatello Water Co. v. Standley (Idaho)*, 61 Pac. Rep. 518; *Southwark, etc., Co. v. Wandsworth*

[1898], 2 Ch. 603; 67 L. J. Ch. 657; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.

¹⁰⁵ *Bryn Mawr Water Co. v. Lower Marion Tp.*, 15 Pa. Co. Ct. Rep. 527; 4 Pa. Dist. Rep. 157.

¹⁰⁶ *Parfitt v. Furgason*, 3 N. Y. App. Div. 176; 73 N. Y. St. Rep. 621; 38 N. Y. Supp. 466; affirming 159 N. Y. 111; 53 N. E. Rep. 707.

¹⁰⁷ *Attorney General v. Sheffield Gas Consumers' Co.*, 3 De G. M. and G. 304; 22 L. J. Ch. 811; 17 Jur. 677; 1 W. R. 185; 2 Gas. Jr. 396, 419; 19 Eng. L. and Eq. 639; *Regina v. Sheffield Gas Consumers' Co.*, 18 Jur. 146, note; *Regina v. Longton Gas. Co.*, 2 E. and E. 651; 29 L. J. M. C. 118; 6 Jur. (N. S.)

company open more streets than is necessary, at any one time, it may be indicted; but if it has agreed to pay the municipality so much per square yard for all of the surface removed, it cannot defend on the ground that in so doing it was liable to indictment and therefore the agreement was void.¹⁰⁸ It is not an indictable nuisance to temporarily obstruct a street in laying down pipes under authority given.¹⁰⁹ But where the highway was eight yards wide, and the gas company dug three trenches, two across it and one parallel with it, these three trenches being kept open at night but closed at three o'clock in the morning; and later other trenches were opened from eleven at night until two o'clock next afternoon, it was held that the company was liable to an indictment for unnecessarily obstructing a highway.¹¹⁰ And where a gas company had no authority to lay its pipes in the street, an abutting property owner who took up the pavement, placed bricks and earth therein, so as to obstruct the highway, to put in a service pipe, was held subject to an indictment, and that he could not justify his actions on the ground that every householder had the right to make such temporary obstruction of a footway or highway as was necessarily incident to the enjoyment of his property.¹¹¹

§495. Cutting into modern pavements.—Repairs.—Permission.

The grant of a right by a municipality to lay and repair mains in its streets cannot be subsequently taken away from it on the ground that new and other methods of improving the streets have been introduced since the original grant has been made; and especially is this true where the grant bound the

601; 2 L. T. (N. S.) 14; 8 W. R. 293; 8 Cox C. C. 317; Attorney General v. Cambridge Consumers' Gas Co., L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145.

¹⁰⁸ Edgeware Highway Board v. Harrow District Gas Co., L. R. 10 Q. B. 92; 44 L. J. Q. B. 1; 31 L. T. (N. S.) 402; 23 W. R. 90.

¹⁰⁹ Preston v. Fullwood, *supra*.

But see Hawkins v. Robinson, 37 J. P. 662, and Wright v. Stears, 48 Gas J. 1068.

¹¹⁰ Regina v. Colne Valley Gas Co., 29 Gas. J. 498, 781; 30 Gas. J. 218.

¹¹¹ Regina v. Longton Gas Co., 2 Ell. and Ell. 651; 2 L. T. (N. S.) 14; 8 Cox C. C. 317; 29 L. J. M. C. 118; 8 Gas. J. 165; 9 Gas. J. 114; 6 Jur. (N. S.) 601; 8 W. R. 293.

company to speedily repair the portions of the street it had opened for the purpose of laying and repairing its mains. Nor can a municipality by a subsequent ordinance require a company to first obtain permission of it to lay or repair its mains, when it had that right, without first obtaining such permission, under its original grant or franchise. "The appellee," said the Indiana Supreme Court, "had been granted the right to use the streets for the purpose mentioned, and the mere fact that any particular street was thereafter paved with brick or macadam would not deprive appellee of exercising its rights under the ordinance upon which it relies. This is manifest when we recognize that the conditions of the bond required of the corporation availing itself of the franchise granted were, that all streets should be restored to as good a condition as they were before, and to maintain the pavement in good repairs where the city had an agreement with the contractor to like effect. As said by the learned counsel for appellee: 'If a macadamized pavement covers up the appellee's rights, so would one constructed of gravel, and so would even slight repairs, for the conditions of the streets would be changed from what it was when the ordinance was accepted.' It is evident, we think, that the contention has no support." Of the ordinance requiring permission of the city board of works before a pavement would be cut into for repairs, the court also said: "We judicially know that by reason of changes occurring from extensive heat, cold and pressure, leaks will and do occur in gas pipes, which require immediate repair. If, then, it should be held that in making these repairs — wherein it would be necessary to uncover the mains — the appellee must await the pleasure of the council and board of aldermen in giving consent, it would be virtually in the same condition as though it had not secured the rights and franchise under" the prior ordinance.¹¹² So an ordinance forbidding a gas company to excavate in a paved

¹¹² Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514. See Western Paving, etc., Co. v. Citizens', etc., Co., 128 Ind. 525; 26 N. E. Rep. 188; 28 N. E. Rep. 88.

street in order to lay pipes from its mains to the opposite side of the street is so unreasonable as to be void.¹¹³

§496. Injury to pipes in repairing streets.

A municipality has the right to repair the streets in which gas pipes are lawfully laid, but it must in doing so have a just regard for the property of the gas company. It may not repair them in a manner to injure such pipes, when at least the repairs can be so made, although in a less convenient way. Thus where the fee of the street was vested in the vestry of the parish, the pipes were lawfully located in the street, and in repairing them it used a steam roller, being a mode of repair most advantageous to both the taxpayers and the public, but the roller was so heavy as to injure the pipes; the court not only gave damages to the gas company, but declared that it was entitled to an injunction to restrain the use of the roller in such a way as to injure the pipes.¹¹⁴ In Ireland an injunction was entered "against using any steam roller on any road under which the gas pipes of the plaintiffs have been laid so as to break or injure any pipes then properly laid under such road, regard being had to what, at the time of the laying of such pipes, was then the ordinary traffic, and the then reasonable means of repairing and maintaining the road."¹¹⁵ If a city let a contract to construct a sewer to a contractor it knows to be incompetent, it will be liable for damages to a gas company's pipes which he may, because of such incompetency, occasion them.¹¹⁶ But the city is not liable where it builds a sewer itself, and injures the pipes of a company, if the injury is not

¹¹³ *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

¹¹⁴ *Gaslight and Coke Co. v. Vestry of St. Mary*, 15 Q. B. Div. 1; 54 L. J. Q. B. 414; 53 L. T. 457; 33 W. R. 892; 49 J. P. 459.

¹¹⁵ *Alliance, etc., Gas Co. v. Dublin Gas Jr.*, June 26, 1900, p. 1733, and July 10, 1900, p. 100.

See 49 Gas Jr. 765, 811; 50 Gas Jr. 1018.

Where a heavy roller broke a gas main, whereby gas escaped into a house and caused an injury, it was held that there was evidence of negligence against the municipality. *Driscoll v. Public Board of Works*, 14 F. L. Rep. 99; 62 J. P. 40.

¹¹⁶ *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; 28 Atl. Rep. 32.

inflicted because of negligence on its part.¹¹⁷ Where a gas company, in ignorance of the true location of its pipe line in a certain street, though both its bookkeeper and collector told a street railway it was in the middle of such street, the bookkeeper and collector believing the statement to be true, and the railway company having made the inquiry in order that it might avoid laying its track over such pipe line, all of which the gas company knew at the time it gave the supposed location of its pipe line; and thereupon the railway company laid its track on one side of the street but immediately over the pipe line, being misled by such statements as to its true location, it was held that the gas company was not estopped to take up its pipe in order to repair it, although in so doing it had to remove the track of the railway company. The court did not consider that the bookkeeper and collector were such agents as to make their statements about the location of the pipe line binding upon the gas company. It was declared, though, that it was the gas company's "duty to know the precise location of their pipes, and to be able to give correct information concerning the same to those who had a right to demand it; and if a gas company wrongly represents the location of its pipes, so as to lead a railway company to lay its track over them when it was seeking to avoid them, then such company would be estopped from claiming the right to disturb the track, even though the gas company was mistaken in regard to the location of the pipes at the time the representations were made."¹¹⁸

§497. Support of gas mains.

If a company has a right to lay its pipes in a street, it has a right to a support for them of the underlying soil; and if the owner of the underlying soil, or any one mining therein,

¹¹⁷ Brunswick Gaslight Co. v. Brunswick, 92 Me. 493; 43 Atl. Rep. 104.

A city in putting in its own gas works is liable for trespass if it interfere with and injure a private system for supplying gas therein,

which has been established under authority of law. Boyer v. Little Falls, 5 N. Y. App. Div. 1; 38 N. Y. Supp. 1114.

¹¹⁸ Davenport, etc., Ry. Co. v. Davenport Gaslight Co., 43 Ia. 301.

even with a right so to do, take away such support and injure the pipes, he will be liable in damages; and that, too, even though he is entitled to damages under an arbitration proceeding for the extra burden of the pipes upon the fee of the highway. What is true of one occupying the highway, is also true of one rightfully occupying a private right of way.¹¹⁹ But if the gas company has laid its pipe line in the soil of another without license so to do, then it is not entitled to support; nor to compensation in damages for a failure to give it.¹²⁰

§498. Gas boxes in street.

A gas box in the street, giving access to a cock in the service pipes conducting gas from the main to the house or building supplied with gas, is a part of the company's apparatus; and although lawfully in the street, the company is bound to exercise care to prevent injury to persons using the street or sidewalk.¹²¹ The court, however, cannot say as a matter of law that a box seven and a half inches long and five and a quarter wide, by one and a half high, extending one and a half inches into the traveled portion of a sidewalk is not a nuisance, in the absence of any evidence showing the exigencies of public travel in the street.¹²²

§499. Leaving gasposts in streets.

When gas posts are no longer used, it is the duty of the gas company to remove them, for they are an obstruction in the

¹¹⁹ *Normanton Gas Co. v. Pope*, 52 L. J. Q. B. 629; 32 W. R. 134; 49 L. T. 798. See *Benfieldside L. B. v. Consett Iron Co.*, 3 Exch. Div. 54; 47 L. J. Exch. 491; 38 L. T. 530; 26 W. R. 114.

¹²⁰ *Middle, etc., Co. v. Oakbank Oil Co.*, 18 Ct. Sess. Cas., 4th Series 788.

¹²¹ *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316; 16 Sup. Ct. Rep. 564; 24 Wash. L. Rep. 470, affirming 20 D. C. 39. In this case the consumer paid the cost of putting in the box. The city was allowed to recover

from the company the amount of damages it had been compelled to pay a person injured by reason of the company having permitted the gas box to get out of repair. In England apparatus of this kind seems to belong to the consumer. *Ward v. Folkstone W. W. Co.*, 24 Q. B. Div. 334; 59 L. J. M. C. 65; 62 L. T. 321; 38 W. R. 426; 54 J. P. 628; *Folkstone v. Downing*, 54 Gas. J. 313.

¹²² *Staples v. Dickson*, 88 Me. 362; 34 Atl. Rep. 168. But see *Loan v. Boston*, 106 Mass. 450.

street. A gas company has the right to maintain gas posts in a street solely by reason of the fact that it supplies light for the streets; and when it ceases to supply the light, it must remove its posts, or else lay itself liable for such damages as may be occasioned thereby.¹²³

§500. Pipes in streets not an additional burden.

Pipes of a gas company laid in the streets of a municipality are not an additional burden on the fee of the street for which the abutting lot owner is entitled to compensation. Such a burden is contemplated, in legal contemplation, when the streets are dedicated, or ground taken for them under the power of eminent domain.¹²⁴ Of course, the duty to serve the public is always an element underlying all grants of a right to use the streets; and this is considered the compensation that the abutting property owner receives for the use of his property.¹²⁵

§501. Pipes laid in navigable river.

Nor may a gas company lay its pipe line on the bed of a navigable river; if it desires to cross such a stream it must bury its pipe line beneath the bed thereof. Thus where a company had full power to lay and maintain pipes for transporta-

¹²³ *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474; 4 So. Rep. 415.

¹²⁴ *Smith v. Goldsboro*, 121 N. C. 350; 28 S. E. Rep. 479; *Boston v. Richardson*, 13 Allen 160; *Crooke v. Flatbush W. W. Co.*, 29 Hun 245; *West v. Bancroft*, 32 Vt. 367; *Palmer v. Larchmont, etc., Co.*, 158 N. Y. 231; 52 N. E. Rep. 1092 (electric light poles). See *Columbia Conduit Co. v. Commonwealth*, 90 Pa. St. 307; *Quincy v. Bull*, 106 Ill. 337; 4 Am. and Eng. Corp. Cas. 554.

¹²⁵ *Ampt v. Cincinnati*, 6 Ohio N. P. 401; *Witcher v. Holland Water Works Co.*, 66 Hun 619; 20

N. Y. Supp. 560; affirmed 142 N. Y. 626; 37 N. Y. Rep. 565.

In *Palmer v. Larchmont, etc., Co.*, *supra*, it is said that the necessity for a light in a highway was for the municipal authorities to determine, and not for the court in a case of ejectionment.

In *Providence Gas Co. v. Thurber*, 2 R. I. 15, it was held that a gas company having an incorporeal easement and not a mere license in the streets was estopped from claiming that its grant under the charter was void, because no compensation was provided thereby for the owners of the land through which its pipes passed.

tion of gas, laid an eight-inch main on the bottom of a navigable river it was crossing; and a steamboat came along, ran into the pipe without fault, and broke it, and gas thereby escaped, entered the furnaces of the boat and exploded, the gas company was held liable for all damages occasioned by the explosion; for the pipe was wrongfully placed on the surface of the river bed.¹²⁶ If a gas company has the right to lay its mains across a river, it must do so that they will neither impede nor hinder boats using such river; and if it do not, and the mains are injured by boats passing up and down the river, the gas company cannot recover damages for such injuries.¹²⁷ And if a gas main is so laid in a navigable river that it impedes navigation, a vessel caught in passing and detained thereby may recover as damages the actual expense of getting free from the obstruction, but not for delay in its business or other consequential damage.¹²⁸

§502. Grant of right to use suburban highway.—Compensation to abutting land owner.

The owner of land abutting on a rural highway has such an interest in it that the legislature cannot authorize gas companies to lay their pipe lines in it without providing a method for compensating him for all damages he may suffer by reason of the additional burden upon the fee.¹²⁹

¹²⁶ *Omslear v. Philadelphia Co.*, 31 Fed. Rep. 354.

¹²⁷ *Milwaukee Gaslight Co. v. Schooner Gamecock*, 23 Wis. 144. See *Municipal Chamber of Hamburg v. Gas Company*, 5 Gas. J. 710.

¹²⁸ *Benson v. Malden, etc., Co.*, 6 Allen 149.

As to being deprived of use of public wharf by a gas company, see *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; rent therefor, *People v. San Francisco*, 54 Cal. 248; and tolls, *Soule v. San Francisco*, 54 Cal. 241.

If a gas company so befool a

river as to work a private (not a public) injury, it will be liable to the person injured. *Manhattan Gaslight Co. v. Barker*, 7 Robt. (N. Y.) 523.

¹²⁹ *Consumers', etc., Co. v. Huntsinger*, 14 Ind. App. 156; 42 N. E. Rep. 640; *Kincaid v. Indianapolis, etc., Co.*, 124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602; *Board v. Indianapolis, etc., Co.*, 134 Ind. 209; 33 N. E. Rep. 972; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96; 81 N. W. Rep. 1041; 50 L. R. A. 298; *Postal Telegraph and Cable Co. v. Eaton*, 170 Ill. 513; 49 N. E. Rep. 365.

§503. Condemnation of land owner's interest in highway.

Proceedings under the power of eminent domain, to condemn the abutting land owner's fee in the highway, does not affect the right of the public, nor give the gas company the right to use the highway without the consent of the public authorities. In addition to a judgment of condemnation, the gas company must procure the consent of the public authorities to use the highway.¹³⁰

**§504. Land owner acquiescing in occupation of rural highway.—
Injunction.— Estoppel.**

While an owner of land abutting upon a rural or suburban highway is entitled to compensation for the additional burden imposed by the laying of pipe lines in such highway, because of the additional burden they impose upon his land beneath the easement; yet if he stands by and makes no objection to the laying of the pipes until they are put to an actual use, he will be estopped to then prevent their use. This is especially true if the company laying the pipes is engaged in a public service. "There was an assertion of a right to use the highway," it was said in one case, "and the gas company had expended large sums of money on the faith of the license granted to it by the board of commissioners. It had assumed to use the highway for a public purpose, and many citizens had acquired rights upon the faith of the successful and effective prosecution and conduct of the work and business undertaken by the company. The appellant, with knowledge of the facts, made no objection until the completion of the main line and system, but delayed until they had been completed and then asked an injunction. To grant the relief he seeks will, it is clearly inferable, seriously impair the rights of the public as well as those of the gas company. We are satisfied that upon the case made by the evidence, the appellant is not entitled to an injunction. In adjudging that he has no right

¹³⁰ Board v. Indianapolis. etc.,
Co., 134 Ind. 209; 33 N. E. Rep.
972.

to an injunction, we do not hold that he may not, in a proper case, recover damages for the invasion of his legal right. What we here decide is, that the case made is not one justifying resort to the extraordinary remedy of injunction. The effect of our decision is that he has mistaken his remedy. The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens. Persons other than the company have an interest, and they are so numerous that it is the duty of the courts to protect that interest where it can be done without materially impairing the rights of any private citizen, and that can be done in this instance, for the appellant, in the appropriate action and upon making a proper case, can be fully compensated for all injury that he may have suffered. There is here an element of public policy which exerts a controlling interest. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural gas. Public policy, as has been demonstrated in analogous cases, requires that the rights of the community should be protected, and the land owner left to his remedy at law. Nor does this rule operate unjustly, for the land owner is not deprived of compensation; on the contrary, the right to compensation is left open to him, and it is his own fault if he does not recover full compensation for all the loss he has actually sustained. Blended with the element of public policy is another influential one, and that is this: The appellant objecting knowingly permitted the work to proceed until it reached a stage at which it would be ruinous to the company which had invested such large sums of money to stop it by injunction. These two elements, in their combined strength, certainly make a case in which an injunction should, upon plain principles of equity, be denied."¹³¹ But the mere

¹³¹ Kincaid v. Indianapolis, etc., 285; 40 N. E. Rep. 34; Consumers', Co., 124 Ind. 577; 24 N. E. Rep. etc., Co. v. Huntsinger, 14 Ind. App. 1066; 8 L. R. A. 602; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 156; 42 N. E. Rep. 640.

fact that the owner of the abutting land made no objection to laying pipe lines in one highway will not estop him to object to the laying of a pipe line in another highway upon which his land abuts.¹³² So if the owner of the fee did not know of the laying of the pipe line in the highway at the time it was laid, the mere fact that he made no objections, after he found out the fact about it, to the line or its maintenance will not estop him from asserting a right to have it removed.¹³³

§505. Pipe lines in country highway an additional burden on the fee.

The easement the public acquires in a right of way taken for a country or suburban highway is one solely of passage — a right to travel along it — and no other. “Subject to the right of the public,” says the Supreme Court of Indiana, “the owner of the fee of a rural road retains all rights and interest in it. He remains the owner, and, as such, his rights are very comprehensive. . . . The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land, and whenever land is subject to an additional burden the owner is entitled to additional compensation. The authorities, although not very numerous, are harmonious upon the proposition that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner.”¹³⁴ An injunction will be granted to protect the rights

¹³² Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34; Galbreath v. Armour, 4 Bell App. Cases 374.

¹³³ Huffman v. State, 21 Ind. App. 449; 52 N. E. Rep. 715.

¹³⁴ Kincaid v. Indianapolis, etc.,

Co., 124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602; Bloomfield, etc., Co. v. Calkins, 62 N. Y. 386; 1 T. and C. 549; Bloomfield, etc., Co. v. Richardson, 63 Barb. 437; Sterling's Appeal, 116 Pa. St. 35; Webb v. Ohio Gas Fuel Co., 16 Wkly. Law Bull. 121; 9 Ohio Dec. Rep. 662; Biddle v.

of an abutting land owner, even though the soil under the highway is of no actual value to him.¹³⁵

§506. Consent of county.—Public highways, crossing.

Where the road is beyond the limits of a city or town, then the consent of the county authorities must be obtained before laying the gas pipes or mains therein. As a rule, the laying of gas pipes in a public highway without consent of the proper authorities is such an act as will lay the individuals doing it liable to an indictment and punishment. "It seems to us," said one court, "that when the Salemonie Gas Company entered upon the lands in question without the consent of the owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully."¹³⁶ Where a statute gave a natural gas company authority "To dig its trenches, to lay its pipe lines over, across or under any . . . road, highway or railroad, so as to not interfere with the free use of the same, which the route thereof shall intersect, in such manner as to afford security for life or property; and whenever the board of county commissioners of the proper county shall so direct, said trenches and pipe lines may be constructed and laid along the right of way of any road or highway, but in all cases where said trenches or pipe lines shall be laid across, upon or along any general road, or highway thus intersected, said company . . . shall immediately restore the same to its former state," it was held that while the natural gas company could cross a public highway without the consent of the board of county commissioners, it could not lay

Wayne W. W. Co., 7 Del. Co. Rep. 161; Murray v. Gibson, 21 Ill. App. 488 (a drain); Indiana, etc., R. R. Co. v. Hartley, 67 Ill. 439 (a drain); Board, etc., Co. v. Barnett, 107 Ill. 507 (a drain); Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640. See Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307.

¹³⁵ Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; Clippens Oil Co. v. Edinburgh, etc., 25 Rettie 370.

¹³⁶ Huffman v. State, 21 Ind. App. 440; 52 N. E. Rep. 713; Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640.

its pipe lines along it without first obtaining consent from them to do so.¹³⁷

§507. Revocation of license to use highway.

Having once granted to a gas company the right to use the rural highway of the county, the county authorities cannot revoke the right if the company has accepted and acted upon it; and in an action to prevent the company from laying its pipes in the highway over which the right was granted to lay pipe lines, the county must not only show facts entitling it to a rescission, that the company had not acted in good faith upon the license granted, and that it was, at the time the suit was instituted, attempting or threatening the use of the highway for the purpose given it in such license.¹³⁸

§508. Abutting land owner removing pipe lines.

If pipe lines have been laid in a public highway without the consent of the abutting land owner, and without compensation to him because of the additional burden on the fee, he may remove them; and neither he nor those assisting him will be liable, in the absence or use of unnecessary force or violence.¹³⁹

§509. Company may not remove pipes unlawfully laid in rural highway.

If a gas company lay pipe lines in a rural highway without the consent of the abutting land owner, it may not remove them without his consent. As soon as they are placed in the soil they become a part of the freehold; and their removal by the company lays it liable to an indictment for trespass upon the land in which they are embedded. "It seems to us," said the Appellate Court of Indiana, "that when the Salemonie Gas Com-

¹³⁷ Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34.

¹³⁸ Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972.

¹³⁹ Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640.

pany entered upon the lands in question without the consent of the owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully. If it was unlawful in the first place to go upon the lands to construct the pipe line, without the consent of the owner, it was likewise unlawful to go upon them to remove the same, and hence when appellant was upon the lands of the prosecuting witness, in charge of a force of men engaged in removing such pipe line, he was unlawfully there. While appellant was not himself engaged in the manual removing of the pipe, he was directing and overseeing the work of removal." "Neither a private person nor a corporation has any inherent right so to use a public thoroughfare, and where the proper steps have not been taken to acquire such right, it is a trespass, within the meaning of the statute, so to do. So, when the appellant went upon the land of the prosecuting witness to take up the pipe line, he was there unlawfully; and when he refused to depart, upon being notified to do so, it was a violation of the statute, for which he must answer."¹⁴⁰

§510. Pipes on surface of highway or street.

Whatever may be the right to lay gas pipes in a highway or street, it is clear that none can be acquired to lay the pipes on its surface. A street or highway is for public travel, and not for private purposes. It must be free from obstructions to travel from side to side, from end to end. If pipes are laid on the surface of a street or highway, the company will be liable for all damages occasioned thereby, even though such damages would not have been occasioned by the pipes if they had been buried in trenches.¹⁴¹ "It is a nuisance and unlawful to place and keep or leave continuously in a public highway anything which either impedes or endangers public travel. This rule applies to the whole width of the highway, and not merely to a worn portion of it commonly used for passage. Privileges

¹⁴⁰ *Huffman v. State*, 21 Ind. Ind. 443; 39 N. E. Rep. 57; 29 L. App. 449; 52 N. E. Rep. 713. R. A. 342.

¹⁴¹ *Lebanon, etc., Co. v. Leap*, 139

which, if usurped by a greater number of persons or corporations would change the road from a public easement to a mere special benefit or convenience to such usurpers, are not lawful for any of them. The user must be consistent with the continued use of the road every part thereof as a passageway by all persons exercising ordinary care.”¹⁴² In the case from which this quotation is made, a half-inch gas pipe, the thickness of the iron being one-eighth of an inch, was laid in the highway four feet from the fence; and it was hid by weeds, and grass that covered it, having laid there several years. A stranger to that neighborhood was taking a traction engine into a field bordering on the highway, and not knowing of the existence of the pipe, ran over it, broke it, and an explosion followed, to his injury. It was held that the company laying the pipe in the highway were liable to recompense him for his injuries. So where a boy eighteen years of age, passing along a highway, stopped to look at burning gas escaping from a pipe laid in such highway, and he was told by another boy with him, that if he would raise up the pipe it would make a nice fire, which he did, and an explosion followed, to his injury, it was held that he could recover, and that he did not so contribute to the explosion so as to bar his right to recover damages.¹⁴³

¹⁴² Indiana, etc., Co. v. McMath, 26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287.

¹⁴³ Lebanon, etc., Co. v. Leap, *su-*

pra. See Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695; 35 N. E. Rep. 1059; 29 L. R. A. 337.

CHAPTER XXIV.

MUNICIPALITY SUPPLYING GAS.

- §511. Municipality may be authorized to own gas plant.
- §512. Sufficiency of statute to authorize municipality to furnish gas for commercial purposes.
- §513. Insufficiency of statute to authorize a municipality to furnish commercial gas.
- §514. Construction of municipal charters.
- §515. Municipality's profit.
- §516. Competition with private plant.
- §517. Election to authorize purchase or erection of plant.
- §518. Municipality must be sole proprietor of plant.— Taking stock.
- §519. Right to purchase plant of gas company.
- §520. Trustees for gas works.
- §521. Sale of municipal plant.
- §522. Municipality may lease its own gas works.
- §523. Rules and regulations.

§511. Municipality may be authorized to own gas plant.

It is clear that a municipality cannot own a gas plant and supply its inhabitants with gas for lighting, heating or power purposes unless some statute in direct terms, or by very strong implication, authorizes it.¹ It is universally the case that such institutions of government are authorized to supply their inhabitants with water; but the practice has not been so universal with reference to light; although the practice is almost daily growing, to extend such power to them. The power of the legislature to authorize a municipality to furnish light for commercial purposes to its inhabitants received a very careful examination by the justices of the Supreme Court of Massachusetts as late as 1890. The constitution of that State authorizes the general court to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," and to levy

¹ Ladd v. Jones, 61 Ill. App. 584.

“proportional and reasonable assessments, rates, and taxes, . . . for the public service, in the necessary defense and support of the government of said commonwealth, and the protection and preservation of the subject thereof.” Under this power the court was of the opinion, when an opinion was requested of it by the legislature, that it could authorize a municipality to not only buy or purchase a gas or electric lighting plant to light its streets and public buildings; but it could also supply its inhabitants with gas and electricity for private purposes. The opinion, however, is confined to the power to furnish gas or electricity for lighting purposes, and nothing is said concerning the furnishing of these commodities for heating or power.² In other States similar opinions have been given.³ To levy a tax to build a plant and supply gas for lighting the streets, and also for domestic purposes, is to levy one for public purposes; and it cannot be defeated on the ground that it is for a private purpose, or a business in which only a private corporation is authorized to enter upon. It is the duty of a municipality to light its streets and public places in order to protect the lives and property of its citizens from thieves, robbers and murderers;⁴ and it is a necessity that its public buildings should be lighted in order that its business may be properly transacted. But to erect a plant for these purposes would necessarily result in a loss to the municipality unless there is connected with it the power to furnish gas to the private consumer. The business of furnishing gas to a municipality is of such a monopolistic character that if it should undertake to furnish it for municipal purposes alone it would be very often impossible for its inhabitants to secure gas from a private source; for in the average municipality one gas company is

² Opinion of the Justices, 150 Mass. 592; 24 N. E. Rep. 1084; 8 L. R. A. 487; Citizens' Gaslight Co. v. Wakefield, 161 Mass. 432; 37 N. E. Rep. 444; Graeff v. Felix, 24 Pa. Co. Ct. Rep. 657.

³ State v. Hamilton, 47 Ohio St. 52; 23 N. E. Rep. 935; Wheeler v. Philadelphia, 77 Pa. St. 338; Linn

v. Chambersburg, 160 Pa. St. 511; 28 Atl. Rep. 842; Hamilton Gaslight and Coke Co. v. Hamilton, 146 U. S. 258; 13 Sup. Ct. Rep. 90; affirming 37 Fed. Rep. 832.

⁴ Crawfordsville v. Braden, 130 Ind. 149; 28 N. E. Rep. 849; 14 L. R. A. 268; 30 Am. St. Rep. 214.

sufficient to supply all the gas needed within its boundaries, and two companies cannot operate with a sufficient profit to maintain their plants. If, therefore, a municipality could not supply its inhabitants with gas for domestic purposes they would often, indeed in a very large majority of cases, be entirely deprived of its use. The rule is universal that taxation for the purpose of building gas and electric plants for lighting purposes by municipalities is such a public subject as authorizes taxation for that purpose.⁵ In furnishing gas to private consumers a city acts in its capacity as a private corporation and not by virtue of its powers of local sovereignty. In such a case the municipality is bound by its contracts with its inhabitants, and the legislature cannot authorize it to violate them.⁶

§512. Sufficiency of statute to authorize municipality to furnish gas for commercial purposes.

Where a statute in direct terms authorizes a municipality to furnish gas for commercial purposes, there is no room for construction; but where the power is an implied one difficulties arise. This difficulty is very well illustrated by an Indiana case. In that State a statute gave a city or town "power to light the streets, alleys and other public places of such city or town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places with the electric light, or other form of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon." Under this statute it was held that a municipality had the power to buy an electric lighting plant, and as an incident to its purchase to

⁵ *Fellows v. Walker*, 39 Fed. Rep. 651; *State v. Toledo*, 48 Ohio St. 112; 26 N. E. Rep. 1061; 11 L. R. A. 729; *Mitchell v. Negaunee*, 113 Mich. 359; 71 N. W. Rep. 646; 38 L. R. A. 157; *Townsend Gas, etc., Co. v. Port Townsend*, 19 Wash. 407; 53 Pac. Rep. 551; *Jacksonville, etc., Co. v. Jacksonville*, 36

Fla. 229; 18 So. Rep. 667; 30 L. R. A. 540; *Schenck v. Olyphant*, 181 Pa. St. 191; 37 Atl. Rep. 258.

⁶ *Western Saving Fund Society v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Bailey v. Philadelphia*, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837.

issue bonds in order to secure money to pay for it. Nothing is said in the opinion concerning the furnishing of commercial light, but it is apparent throughout that the municipality was about to engage upon that enterprise.⁷ In a subsequent case the power of a municipality to furnish light to a private consumer for remuneration was directly presented; and its power upheld under the statute quoted. The court considered that "the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and properties of its inhabitants, and as a check on immorality." "So far as lighting the streets, alleys, and public places, of a municipal corporation is concerned," said the court, "we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless this discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and financial condition of the corporation." In discussing the power to furnish light for commercial purposes, the court added: "The corporation possessing, as it does, the power to generate and distribute throughout its limits, electricity for the lighting of the streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to its inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health."⁸ A statute of Iowa gave a municipality power "to establish and maintain gas works or electric light plants, with all the necessary poles, wires, burners, and other requisites of said gas works or electric light plant." Under this statute it was held that it had the power to furnish commercial light. "It has been the uniform rule," said the court, "that a city, in erecting gas works or water works, is not limited to furnishing gas or water for use only upon the streets and other public

⁷ *Rushville Gas Co. v. Rushville*, L. R. A. 268; 30 Am. St. Rep. 214; 121 Ind. 206; 23 N. E. Rep. 72. *Rockebrandt v. Madison*. 9 Ind.

⁸ *Crawfordsville v. Braden*. 130 App. 227; 36 N. E. Rep. 444. Ind. 149; 28 N. E. Rep. 849; 14

places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category.”⁹ In Tennessee a statute authorized a municipality to provide itself “with water by water works, within or beyond its boundaries, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies.” Acting under the authority thus conferred, a city established water works, and in addition to making provision for the extinguishment of fires, it furnished water to the citizens. The action of the city was upheld by the Supreme Court of that State. “Nothing,” said the court, “should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of a well equipped water works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not a strictly governmental or municipal function, which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. . . . It is the doing of an act for the public weal — a lending of corporate property to a public use. . . . It cannot be held that the city, in doing so, is engaged in a private enterprise, or performing a municipal function for a private end.”¹⁰ Under an authority to contract and be contracted with, sue and be sued, and do all things for the benefit of the city,” a city may construct and maintain a water and light plant or either one.¹¹ So under a statute authorizing a city to issue bonds for municipal pur-

⁹ Thomson-Houston Electric Co. v. Newton, 42 Fed. Rep. 723. The Indiana Supreme Court in the case just cited considered that this statute did not confer any power not included among the implied powers of a municipal corporation.

¹⁰ Smith v. Nashville, 88 Tenn.

464; 12 S. W. Rep. 924; Ellinwood v. Reedsburg, 91 Wis. 131; 64 N. W. Rep. 885; Hummelstown v. Brunner, 17 Pa. Co. Ct. Rep. 140; 5 Pa. Dist. Rep. 8.

¹¹ Heilbron v. Cuthbert, 96 Ga. 312; 23 S. E. 206.

poses a city may issue them to build a plant to light its streets and supply commercial light.¹²

§513. Insufficiency of statute to authorize a municipality to furnish commercial gas.

Courts have not always indulged in the liberal interpretation of statutes that has been exhibited in the previous section. In South Carolina the Supreme Court said on a question of this kind: "The city has the express power to own property, and it also has the implied right to light the city. . . . Considering that some discretion as to the mode and manner should be allowed the municipality, in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the power of the city to furnish light to private citizens, on the ground that to do so would be entering into private business outside of the scope of the city government.¹³ The same conclusion was reached in Massachusetts. The statutes of the State — many in number — are reviewed at length; but it is held that none authorize a municipality to embark in the enterprise of furnishing private citizens light in connection with the light it furnishes for lighting its streets; indeed, it is said that a municipality is under no obligation to light its streets.¹⁴ So in New Jersey a municipality is not authorized to erect and maintain an electric plant by a power to pass ordinances for "lighting the streets"; for another provision requires the council to establish lamp, police and water districts in the city, and directs that the taxes for lighting streets shall be assessed wholly on the property within these districts. This statute also authorizes the city to enter into a

¹²Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229; 18 So. Rep. 677; 30 L. R. A. 540. 1; 11 S. E. Rep. 434; 8 L. R. A. 291.

¹⁴Spaulding v. Peabody, 153 Mass. 129; 26 N. E. Rep. 421; 10 L. R. A. 397.

¹³Mauldin v. Grenville, 33 S. C.

contract for street lights with any party, for a term not exceeding five years, and to annually levy and collect a tax to pay the expense thereof.¹⁵

§514. Construction of municipal charters.

In determining whether or not a municipality may own a gas plant and supply its inhabitants with gas for lighting, heating or power purposes, it must be borne in mind that a municipality has only such powers as the State through its constitution or legislative body has conferred upon it. "They [municipalities] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."¹⁶ It is, therefore, a rule of interpretation of the charters of a municipality, or of the laws under which it is

¹⁵ Howell v. Millville, 60 N. J. L. 95; 36 Atl. Rep. 691.

The objection that a city has no power to purchase water works cannot be made by the owner of the works in order to defeat his contract with the city for the sale thereof. Bristol v. Bristol, etc., W. W., 19 R. I. 413; 34 Atl. Rep. 359; 32 L. R. A. 740.

In North Carolina it was held that furnishing water to the inhabitants of a city was not in itself a necessary city expense in the sense that a city must own and operate a system of water works. Charlotte v. Shepard, 120 N. C. 411; 27 S. E. Rep. 100.

In New Jersey it is said that making and selling gas is not a prerogative of government. Jersey

City Gas Co. v. Dwight, 29 N. J. Eq. 242.

¹⁶ Cooley Const. Lim. (6th ed.) 227; citing Stetson v. Kempton, 13 Mass. 272; Willard v. Killingworth, 8 Conn. 247; Abendroth v. Greenwich, 29 Conn. 356; Baldwin v. North Branford, 32 Conn. 47; Webster v. Harwinton, 32 Conn. 131; Douglass v. Placerville, 18 Cal. 644; Lackland v. North. Mo. R. R. Co., 31 Mo. 180; Mays v. Cincinnati, 1 Ohio St. 268; Frost v. Belmont, 6 Allen 152; Hess v. Pegg, 7 Nev. 23; Ould v. Richmond, 23 Gratt. 464; 14 Am. Rep. 139; Youngblood v. Sexton, 32 Mich. 406; 20 Am. Rep. 654; Detroit Citizens' St. Ry. v. Detroit Ry., 171 U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W. Rep. 304.

incorporated, that power not expressly given will not be presumed, unless necessarily or fairly implied in or incident to other powers expressly given — not simply convenient, but indispensable to them.¹⁷

§515. Municipality's profit.

If the avowed purpose of the object of a municipality in furnishing gas is merely a business venture, with a view to make a profit by the undertaking, and not to furnish gas to its inhabitants as cheaply as it can reasonably be done without loss and to obtain lights for its streets, then it may well be doubted if it can engage in such business; for to do so would be to authorize a municipality to engage in purely a commercial adventure. But just where the line shall be drawn in fixing the rates it may charge is difficult to determine. Such a question is an illustration of a theoretical rather than a practical problem. Prudence should dictate to a municipality to fix the rate not only sufficiently high to pay all running expenses, but high enough to furnish a fund for repairing the machinery and other parts of the plant, and, indeed, to create a fund to replace them when they are ultimately worn out, without resorting to the power of taxation to obtain new machinery. To permit the municipality to fix the rate so high that it will not only furnish these several sums, but also make at least a return of a sum sufficient to pay the usual rate of interest on the investment, would be to allow it to engage in a commercial adventure, as clearly so as to allow it to make a greater amount termed "profit."¹⁸ Of course, if a plant is self-sustaining, and the municipality thereby gets its street and own light free of charge (as is usually the case), then an inequality necessarily arises among its inhabitants; for those who use the gas necessarily pay a rate so high that it enables the municipality to supply

¹⁷ *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558; *Detroit Citizens' St. Ry. v. Detroit Ry.*, 171 U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W.

Rep. 304; *Park Com'rs. v. Common Council*, 28 Mich. 228, 239.

¹⁸ See *Hamilton v. Hamilton, etc. Gaslight Co.*, 11 Ohio Dec. 512; *Dixon v. Entriken*, 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. Rep. 414.

its streets and its public buildings with light free of cost to itself, while those of its inhabitants who do not use the gas contribute nothing towards the lighting of such streets and public buildings. The inequality may not be very great, and yet it will exist. The author does not recall any instance where this fact of inequality has been urged as a reason why statutes authorizing a municipality to furnish gas, light or water to private consumers are unconstitutional, or such an enterprise unauthorized.¹⁹

§516. Competition with private plant.

As a general rule, a municipality cannot deprive itself, in making a grant to a private company, of the right to furnish light or water, nor bind itself not to erect a plant of its own and not to compete with such company in the furnishing of light and water, where its charter authorizes it to put in a light or water plant.²⁰ The city may occupy with its mains the same streets the private company is occupying.²¹ If a municipality has the authority to take water works under the power of eminent domain, such power is not taken away by a contract with a private company for the supply of water during a term of years having in it a provision requiring the payment of hydrant rentals by such municipality.²²

§517. Election to authorize purchase or erection of plant.

Recent statutes frequently limit the power of a municipality to purchase or erect a lighting plant, by first requiring the question to be submitted to a vote of the inhabitants of the

¹⁹ Water or gas rates are not taxes which may be collected by the tax collector. *Dixon v. Entriken*. 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. Rep. 414.

²⁰ *North Springs Water Co. v. Tacoma*. 21 Wash. 517; 58 Pac. Rep. 773; 47 L. R. A. 214. See *Walla Walla v. Walla Walla Water*

Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957.

²¹ *Hughes v. Mومence*, 163 Ill. 535; 45 N. E. Rep. 300.

²² *Long Island Water Supply Co. v. Brooklyn*. 166 U. S. 685; affirming 143 N. Y. 596; 38 N. E. Rep. 983; 17 Sup. Ct. Rep. 718; 29 Chicago L. N. 313. See *North Springs Water Co. v. Tacoma*, *supra*.

municipality. Notice of the proposition is required to be given. Sometimes these propositions are voted upon at a general election, in connection with the election of officers, and at other times a special election is held for the sole purpose of taking the sense of the electors upon the propositions submitted to them. Thus a statute of Massachusetts required two affirmative votes, taken at a meeting that is peculiar to the town organizations of that State, before the town could erect a plant; and if the vote should at both meetings be in the affirmative, the town could then erect a plant. It also provided that the town might purchase any existing plant in the town, after such votes had been taken, if the owner of it consented to sell it and they could agree on terms; but if the city declined to purchase, then the owner could apply to the court for the appointment of commissioners to fix the value of his plant, and the town was then compelled to take it at the figures thus fixed. Under this statute it was decided that a third vote to buy an existing plant was not necessary; that the fact of the poles of the plant not being legally in the streets would not defeat the petition of the owner, that fact going only to reduce the value of the plant; and that that portion of the statute requiring the town to purchase the plant was constitutional, it being optional with the owner to sell.²³ Slight variations among the separate instruments calling for an election, the notice of election and the like do not invalidate the proceedings. But a proceeding for the building of a plant is invalidated by the fact that the resolution adopted stated that bonds would be issued "for the erection and purchase," the mayor's proclamation that it was "for the erection," and the ordinance that it was "for the erection or construction" of a plant. Such a double purpose is stated as to invalidate the proceedings.²⁴ A city may issue bonds for a water plant alone under a charter provision by separate provisions to be voted on, for the issuing of bonds for building one

²³ *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 432; 37 N. E. Rep. 444. See *Baltimore, etc., Co. v. People (Ill.)*, 66 N. E. Rep. 246.

57 Ohio St. 374; 49 N. E. Rep. 335, reversing 14 Ohio C. C. 219; 7 Ohio Dec. 527; 38 Wkly. L. Bull. 200; 39 Wkly. L. Bull. 139.

²⁴ *Elyria Gas, etc., Co. v. Elyria*,

kind of a plant without building the other also, although they are called "water and light bonds" in the charter.²⁵ Of course the power to issue bonds or borrow money to build or purchase a plant is subject to constitutional limitations concerning indebtedness.²⁶ Where a statute requires a vote to be first taken to determine whether a lighting system shall be acquired by the municipality, the municipal authorities cannot waive a compliance with the provisions of the statute; for the sanction of the vote is a condition precedent to the right of the municipality to institute condemnatory proceedings, when necessary, to acquire property for the plant.²⁷ So power whereby a lighting undertaking may be authorized by a provisional order of a municipality to purchase such undertaking compulsorily on issuing corporation stock to a certain amount is in abeyance so long as the municipality has no power to issue irredeemable stock because of a subsequent provisional order taking away the power previously held, but not exercised by the municipality, although the statutes confirming the two orders were approved on the same day.²⁸

§518. Municipality must be sole proprietor of plant.—Taking stock.

Whether or not a municipality must be the sole owner of a gas plant, or whether it may embark in the enterprise in connection with private funds, depends upon the State constitution and statutes of the State. In some States their constitutions forbid a municipality to become a stockholder in any stock company, corporation, or association, or even to raise money for or loan its credit to or in aid of any such company, corporation, or association. Such a provision is sufficient to prohibit it from becoming a part owner of a gas plant, the remaining portion being held by private individuals. Such a provision is broad enough to forbid additions to the works of

²⁵ *Janeway v. Duluth*, 65 Minn. 292; 68 N. W. Rep. 24.

²⁶ *Spilman v. Parkersburg*, 35 W. Va. 605; 14 S. E. Rep. 279.

²⁷ *In re LeRoy*, 23 N. Y. Misc. 53; 50 N. Y. Supp. 611.

²⁸ *Sheffield v. Sheffield, etc., Co.* [1898], 1 Ch. 203; 77 Law T. Rep. 616; 67 L. J. Ch. (N. S.) 113.

the municipality made by private capital, with a view of leasing such additions to it.²⁹ But if no provision of the constitution prohibit the investment, a statute may provide that a municipality may take stock in a company organized to furnish light to a city and its inhabitants.³⁰ A statute forbidding a municipality to make any subscription to the capital stock of an incorporated company or loan its credit for the benefit of such company, is not violated by an agreement in water contract to pay the hydrant rentals to the bondholders of the company supplying the water.³¹

§519. Right to purchase plant of gas company.

Statutes frequently authorize a municipality to bind itself to purchase the plant of a gas company at the end of a term of years during which it supplies it with light; ³² and without such an express statute there is nothing objectionable to such a contract. It simply authorizes the purchase of a plant already in existence, instead of the municipality undertaking to build a plant of its own.³³

²⁹ *Ampt v. Cincinnati*, 56 Ohio St. 47; 37 Wkly. L. Bull. 161; 46 N. E. Rep. 69; 35 L. R. A. 737; modifying 12 Ohio C. C. 119; 1 Ohio C. D. 356.

³⁰ See *Marlborough Gaslight Co. v. Neal*, 166 Mass. 217; 44 N. E. Rep. 139; *Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. 531.

³¹ *State v. Great Falls*, 19 Mont. 518; 49 Pac. Rep. 15.

A city may be authorized to take bonds in a gas company. *New Orleans v. Clark*, 95 U. S. 644. In England, it may issue stock to establish a lighting plant. *Sheffield v. Sheffield Electric Light Co.* [1898]. 1 Ch. 203; 77 L. T. Rep. 616; 67 L. J. Ch. (N. S.) 113.

³² *Neosho City Water Co. v. Neosho*. 136 Mo. 498; 38 S. W. Rep. 89.

³³ See *Wheeling Gas Co. v. Wheeling*. 8 W. Va. 320.

If the price to be paid by the city is to be fixed by arbitrators, part chosen by the city and part by the gas company, and the former choose its arbitrators and notify the company; and the gas company refuse to select any, the city's remedy is to apply for a writ of mandamus to compel it to select its arbitrators, and not a suit in equity to enforce a sale at the price fixed by the city's arbitrators. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69.

Where a municipality had the power to purchase certain gas works, and certain moneys were to be raised for this and other purposes, an injunction to restrain the municipality from opposing a bill promoted by the gas company to extend its works was refused, on the ground that such extension might prevent the municipality from purchasing the works, by exceeding in

§520. Trustees for gas works.

Occasionally trustees are appointed to manage gas works where they are conducted by a municipality. This was the case with the Philadelphia gas plant. That plant was owned by private individuals, and was taken possession of by that city. The stock was replaced by certificates issued by the city to the stockholders according to their several holdings, and trustees were selected and given full control of the works and their management; and they were to create a fund to pay off these certificates and the indebtedness. After these trustees had taken charge, an ordinance was passed by the common council appointing a chief engineer, who was by it put at the head of the gas department of the city; and all moneys collected for gas furnished was to be paid to such officers as he should select. Creditors objected to the engineer taking possession, and to his interfering with the trustees' control of the gas works; and the court upheld them in their objection, and issued an order restraining them. They were entitled, so the court held, to an injunction on the ground that there was such a contract between the city and the creditors as a court of equity would protect; and that when it entered upon such an enterprise it was acting in its capacity as a private corporation, and not in its legislative capacity.³⁴ These trustees are generally subject to the control of the municipality, and have only such powers as its common council or legislative body may bestow upon them. An instance of their limited power is found in an Ohio case. In that State a statute provided for a board of trustees to manage the municipality's gas plant; and also empowered them to "prescribe by bylaws the price of gas and coke, under such rules and regulations as by ordinance the council may prescribe." The board in the absence of such an

value the sum allotted to the municipality by its act for expenditure for this and other purposes. *Attorney General v. Mayor of St. Helens*, W. N. (1870) 150.

³⁴ *Western Saving Fund Society v. Philadelphia*, 31 Pa. St. 175; 72

Am. Dec. 730. See *Bailey v. Philadelphia*, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837 (affirming 6 Pa. Dist. Rep. 727; 20 Pa. Co. Ct. 173, where a lease of these works was upheld).

ordinance undertook to fix the price of gas, over the objection of the gas company; and their action was held void.³⁵ In this State it is also held that so long as an ordinance is in force creating a board of officers to manage the city's gas plant, the council cannot take upon itself the management, through its employees, of its electric lighting plant.³⁶ The statute referred to in the foregoing sentence authorized the common council to create and appoint a board of trustees, when it had determined to build a lighting plant, to construct the works, and to manage them when they should have been built. The board could not only construct the works, but extend gas pipes, manufacture and sell gas and coke, collect gas bills and other moneys due for gas, coke or other material sold by it, having power to purchase material, employ laborers, appoint officers, purchase or lease the necessary real estate and erect buildings upon it. All money collected for gas works purposes had to be deposited weekly, by its collectors, with the treasurer of the municipality, and be kept as a separate and distinct fund, subject to the order of the board. This money, as well as that levied by the municipality for the gas works, was to be disbursed by the board of trustees. It was held that the board of trustees did not have power, under this statute, to charge the municipality with a general liability on account of machinery or appliances purchased by them for the works under their control; and that they had no authority to control the funds thus placed in their hands independent of the council, because of another statute which provided that "no contract, agreement or other obligations, involving the expenditure of money shall be entered into,

³⁵ Foster v. Findlay, 5 Ohio Cir. Ct. Rep. 455; 3 Ohio Cir. Dec. 224. See Bellaire Goblet Co. v. Findlay, 5 Ohio Cir. Ct. 418; 3 Ohio Cir. Dec. 205.

³⁶ Shaw v. Jones, 6 Ohio Dec. 453; 4 Ohio N. P. 372.

In a case involving the Philadelphia gas trustees' power, it was held that they were not required to advertise for bids for coal and

let it to the lowest bidder as the city did when it purchased supplies, for the reason that the gas works were not a department of the city government within the provision of the Act of May 13, 1856, requiring the city to advertise for bids and let out the supply of materials to the lowest bidder. Hacker v. Philadelphia. 6 Phila. 94.

nor shall any ordinance, resolution or order for the appropriation or expenditure of money be passed by the city council or by any board or officers of a municipal corporation " unless the city auditor or clerk, " shall first certify that money required for the contract . . . or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose." ³⁷ A statute of this same State provides that no municipal officer until one year after his office has expired, shall be either directly or indirectly interested in the work of his city. Under this statute one of the gas trustees cannot be employed by the others until the end of such year, to supervise the property of the city in the territory where the gas is obtained and where the leased lands of the city are located, or manage its works. ³⁸

§521. Sale of municipal plant.

A municipality usually has the power to sell its lighting plant; but this power is usually given under the statutes authorizing it to dispose of its property generally. Thus a statute empowered a municipality " to acquire by purchase or otherwise and hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same," and it was held that under this clause it might sell its gas plant, the court saying that the statute " clearly gives the city the power to make such sale whenever, in the judgment of the officers of the city, it becomes for the best interests of such city." ³⁹ In a sale of its plant, as a part of the consideration, the municipality may bind itself to pay such a greater sum per light as will be equal to the taxes to be paid by the company, even in the event that such municipality had no right to exempt the purchasing company from taxation. ⁴⁰ A provision

³⁷ *Kerr v. Bellefontaine*, 59 Ohio St. 446; 52 N. E. Rep. 1024.

³⁸ *Findlay v. Parker*, 17 Ohio C. C. 294; 9 Ohio Cir. Dec. 710.

³⁹ *Thompson v. Nemeyer*, 59 Ohio St. 486; 52 N. E. Rep. 1024; *Ker-*

lin Bros. Co. v. Toledo, 20 Ohio C. C. 603; 8 Ohio N. P. 62.

⁴⁰ *Frankfort v. Capitol City, etc., Co.*, 16 Ky. L. Rep. 780; 29 S. W. Rep. 855.

in the contract of sale to the effect that the company shall fulfill its contract to furnish gas to the extent that such contracts can be fulfilled, the purchaser must make all necessary connections for the furnishing of gas which were customarily made.⁴¹

§522. Municipality may lease its own gas works.

A city owning its gas works may sell, lease, or altogether abandon them; and the lease is not an interference with the executive functions of its board of public works which has their direction, control and administration. In the execution of such a lease there is no delegation of any municipal power, legislative or otherwise, which involves a municipal duty. In the ownership and control of gas works a city acts in a business capacity only; and the inability of its common council to bind the discretion of its successors for a term of years, in respect to municipal or governmental function, is not involved in the granting of the lease. In such a lease the municipality may bind itself that it will not in any way interfere with, restrict, limit or imperil the exclusive right vested in the lessee by the lease where the municipality had the sole right and was the only company supplying gas in the municipality; and such a lease does not create a monopoly against public policy where the franchise of the lessee is derived from the State, and not from the municipality, and it merely makes the privilege exclusive so far as the municipality is concerned.⁴² The lease by the council of the city's gas works for a definite period—

⁴¹ *Pittsburg Carbon Co. v. Philadelphia*, 130 Pa. St. 438; 18 Atl. Rep. 732.

⁴² *Bailey v. Philadelphia*, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837; 63 Am. St. Rep. 812; affirming 6 Pa. Dist. Rep. 727; 20 Pa. Co. Ct. 173. In the lower court it was also held that the discretion given to a city council to lease the city's gas works invested them with power to lay more stress upon the responsibility of

an applicant for a lease than upon the amount of his bid; and that the holders of the gas lease had no standing to enjoin the lease of the gas works; as the promise of the city to apply a certain per cent of the receipts from the works to the sinking fund created for the payment of the bonds was only a promise, and of no greater sanctity than the promise to pay the bonds at maturity.

as twenty years — does not necessarily constitute a suspension of the legislative power of succeeding councils, and is not for that reason void.⁴³ The city may bind itself not to again engage in the manufacture and sale of gas so long as the lease continues.⁴⁴

§523. Rules and regulations.

When a municipality engages in supplying gas to private consumers, it may adopt rules and regulations for supplying such gas, the same as a private company; and the legislature may authorize the board of trustees or commissioners to do so; ⁴⁵ and no doubt the common council may also adopt,⁴⁶ or authorize such board to adopt all necessary and reasonable rules for that purpose. For non-payment of bills, or for abuse in its use or violation of proper rules the supply may be cut off.⁴⁷ It may provide by ordinance that where the gas is shut off for failure to pay gas bills, it shall not be turned on again until such bills are paid with the penalty that may be due and all expenses of turning it off.⁴⁸ A municipality can no more discriminate between consumers than a private company.⁴⁹

⁴³ *Higgins v. San Diego*, 118 Cal. 524; 45 Pac. Rep. 824; 50 Pac. Rep. 670; *Newport v. Newport Light Co.*, 84 Ky. 166.

⁴⁴ *Bailey v. Philadelphia*, *supra*.

⁴⁵ *Brass v. Rathbone*, 153 N. Y. 435; 47 N. E. Rep. 905; affirming 40 N. Y. Supp. 466; 8 App. Div. 78.

⁴⁶ *Altoona v. Shellenberger*, 6 Pa. Dis. Rep. 544.

⁴⁷ *Brass v. Rathbone*, *supra*. *Altoona v. Shellenberger*, *supra*.

⁴⁸ *Altoona v. Shellenberger*, *supra*.

⁴⁹ *Rierker v. Lancaster*, 14 Lanc. L. Rev. 393.

CHAPTER XXV.

THE GAS COMPANY AND CONSUMER.

- §524. No requirement at common law.
- §525. Company must supply gas.
- §526. No discriminations.
- §527. Failure of supply of natural gas.—Discrimination.
- §528. Supply only to abutting property owners.
- §529. Extension of mains or pipes.
- §530. Inspection of premises.
- §531. Mandamus to compel supply.
- §532. Mandamus to compel furnishing of gas to a city.
- §533. Penalties for failure to supply gas—Damages.
- §534. Damages for failure to supply gas.—Sickness.
- §535. Limiting liability for failure to supply gas.
- §536. Application for gas.
- §537. Rules and regulations.
- §538. Subscribing to rules and regulations.
- §539. Price to be charged.
- §540. Payment in advance.
- §541. Deposits.
- §542. Discrimination in use.—Rates.
- §543. Classification of customers.—Rates.
- §544. Recovering back overcharges.
- §545. Collection of rents.—Action.
- §546. Collection of rents by distress.
- §547. Shutting off gas for failure to pay.
- §548. Injunction to prevent cutting off gas supply.—Rates.
- §549. Consumer's right to discontinue use of gas.
- §550. Ownership of supply pipe.

§524. No requirement at common law.

At common law there was no obligation upon a gas company to supply either the municipality or an individual with gas; and this is the result of the early decisions in this country and England. The right to have gas delivered by a gas company was placed purely upon contract; and aside from a contract it was considered that no obligation rested upon the company to

furnish it. A gas company was regarded as a purely private concern, being neither a public or quasi-public corporation. It was regarded the same as if it were an individual — a person — who owned a gas plant and manufactured gas.¹ And the fact that the company's pipes occupied the street in the front of an abutting land owner's property did not impose upon it a duty to supply such land owner with gas. "No duty is imposed upon them," said the Supreme Court of Massachusetts, "nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their option whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election. Nor is any power conferred on them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right or privilege given to them is to dig up public streets and ways for the purpose of laying down their mains or pipes."² So in New Jersey "power and authority to manufacture, make and sell gas for the purpose of lighting the streets, buildings and manufactories and other places situate in" a certain town was held to be merely permission; and the company could refuse to supply a resident of the town, although it at the time was supplying some of the inhabitants of such town.³ And even though a company has begun to supply a customer gas, who has his premises all fitted up with gas pipes and fixtures to receive the gas, it may discontinue the supply of gas at any time unless it is under a contract to supply it,⁴ even though he, by such discontinuance, will suffer more than nominal dam-

¹ See *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. 27 N. J. L. 245; 72 Am. Dec. 360. See now *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311.

² *Commonwealth v. Lowell Gaslight Co.*, 12 Allen 75.

³ *Patterson Gaslight Co. v. Brady*, 30 Conn. 521; 79 Am. Dec. 278.

⁴ *McCune v. Norwich City Gas Co.*, 30 Conn. 521; 79 Am. Dec. 278.

ages.⁵ Nor does the fact of quarterly payments or the hiring of a meter by the year, or of the company being the only one in the neighborhood furnishing gas, afford any ground for implying a contract to furnish gas;⁶ nor even where the company holds a deposit to secure payment for gas used.⁷

§525. Company must supply gas.

But the better line of authority, and the more recent cases, aside from any statute, ordinance or contract expressly requiring it, hold that gas companies must supply those whose property abutts upon their lines and that the duty rises from the character of such institutions, they being quasi-public corporations and occupying the streets and public highways.⁸ "A natural gas company," said the Supreme Court of Indiana, "occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the house abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus."⁹ It is especially true such companies are under a duty to supply persons whose property abutts on their lines, where they have an exclusive grant or monopoly of the supplying of gas in that

⁵ *Pudsey Coal Gas Co. v. Bradford*, L. R. 15 Eq. 167; 21 W. R. 286; 42 L. J. Ch. 293; 22 Gas J. 54; *Commonwealth v. Wilkes-Barre Gas Co.*, 2 Kulp (Pa.) 499.

⁶ *Hoddesdon Gas and Coke Co. v. Haselwood*, 6 C. B. (N. S.) 239; 5 Jur. (N. S.) 1013; 28 L. J. C. P. 268; 7 W. R. 415; 8 Gas J. 261.

⁷ *Houlgate v. Surrey Consumers' Gas Co.*, 8 Gas J. 261.

⁸ *Commercial Bank v. London Gas Co.*, 20 Up. Can. Q. B. 233; *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; 18 N. W. Rep. 236; 4 Am. and Eng. Corp. Cas. 66.

⁹ *Portland Natural Gas Co. v. State*, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; *Spratt v. South Metropolitan Gas Co.*, 7 Gas J. 663; *Baltimore Gaslight Co. v. Colliday*, 25 Md. 1; *Indiana, etc. Gas Co. v. State*, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761; *Jordeson v. Sutton, etc., Co.*, 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137; affirmed 68 L. J. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497.

municipality;¹⁰ or the right of eminent domain to secure a right of way for their pipe lines.¹¹ In many instances the duty to furnish the inhabitants of a municipality with gas is enforced by statute or by ordinance.¹² It is the duty of a gas

¹⁰ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 6 Sup. Ct. Rep. 252; *People v. Manhattan Gas Co.*, 45 Barb. 136; 1 Abb. Pr. (N. S.) 404; 30 How Pr. 87; *Shepherd v. Milwaukee Gaslight Co.*, 11 Wis. 234; 15 Wis. 318; 82 Am. Dec. 679; 6 Wis. 539; *Owensboro Gaslight Co. v. Hildebrand*, 10 Ky. L. Rep. 983; 42 S. W. Rep. 351; *Brunswick Gaslight Co. v. U. S., etc., Co.*, 85 Me. 532; 27 Atl. Rep. 525; 35 Am. St. Rep. 385; 43 Am. and Eng. Corp. Cas. 450; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69; *Shepherd v. Milwaukee Gaslight Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Indiana, etc., Co. v. State*, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

¹¹ *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Amer. and Eng. Corp. Cas. (N. S.) 771; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; 9 Sup. Ct. Rep. 953; *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; *Hangen v. Albina, etc., Co.*, 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424; *Crumley v. Watauga Water Co.*, 99 Tenn. 420; 41 S. W. Rep. 1058; *American, etc., Co. v. State*, 46 Neb. 194; 64 N. W. Rep. 711; 30 L. R. A. 447; *State v. Butte City Water Co.*, 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238; *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21; *New York Central, etc., R. R. v. Metropolitan Gaslight Co.*, 5 Hun 201; *Morey v. Metropolitan Gaslight Co.*, 38 N. Y. Super. Ct.

185; *Schmeer v. Gaslight Co.*, 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; 70 N. Y. St. Rep. 92; *Woodburn v. Auburn*, 87 Me. 287; 32 Atl. Rep. 906; *Mackin v. Portland Gas Co.*, 38 Ore. 120; 61 Pac. Rep. 134 (rehearing denied, 62 Pac. Rep. 20); 49 L. R. A. 596; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429; 41 S. W. Rep. 1060; *Graves v. Key City Gas Co.*, 93 Ia. 470; 61 N. W. Rep. 937; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240; *Crescent Steel Co. v. Equitable Gas Co.*, 23 Pittsb. Leg. J. (N. S.) 316; *Bath Gaslight Co. v. Claffey*, 74 Hun 638; 26 N. Y. Supp. 287; *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406; *Cincinnati, etc., Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *People v. N. York, etc., Co.*, 56 N. Y. Supp. 364; *New Orleans, etc., Co. v. Paulding*, 12 Rob. (La.) 378; *Jenkins v. Columbia, etc., Co.*, 13 Wash. 502; 43 Pac. Rep. 328; *Bailey v. Fayette Gas Fuel Co.*, 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505.

¹² *Jones v. Rochester Gas, etc., Co.*, 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105; *Ferguson v. Metropolitan, etc., Co.*, 37 How Pr. 189; *Morey v. Metropolitan Gaslight Co.*, 38 N. Y. Supr. 185; *Pearson v. Phoenix Gas Co.*, 12 Gas J. 69; *Commercial Gas Co. v. Scott*, L. R. 10 Q. B. 400; 25 Gas J. 889; *Smith v. Capitol Gas Co.*, 132 Cal. 209; 64 Pac. Rep. 258.

company to furnish gas to a customer even though he is furnished gas by another company. It is the customer's privilege to quit the other company if he sees fit; or to take from both of them.¹³ Even in England where formerly it was held that no obligation rested upon a company to furnish gas; yet if the company had entered into a contract to furnish it and failed to do so, it was liable in damages.¹⁴

§526. No discriminations.

Not only is it the duty of a gas company to furnish gas, but it is its duty to treat all alike. It cannot discriminate between customers either in prices or in imposing upon them regulations not applicable to all of their customers under the same circumstances. It must furnish gas without preference or partiality, whether that duty be imposed by statute or not.¹⁵ This statement, however, must be taken with the qualification that the customer has or is willing to comply with all reasonable

¹³ *Portland Natural Gas Co. v. State*, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639.

¹⁴ *Whitehouse v. Liverpool, etc., Co.*, 5 C. B. 798; 5 M. Gr. and S. 798.

In *Commonwealth v. Wilkes-Barre Gas Co.*, 2 Kulp 499, it is said that the duty of a gas company to supply all persons of a municipality with gas cannot be inferred like the duty of a common carrier, from the fact that it is engaged in business; the duty arises only from the charter.

The assignee of a gas company's right to furnish gas is bound by the original grant of the privilege of supplying the municipality with gas. *Freeport School District v. Enterprise Natural Gas Co.*, 18 Pa. Super. Ct. 73.

A company cannot escape its duty to supply gas by assigning its franchise. *Bath Gaslight Co. v. Claf-*

ey, 74 Hun 638; 26 N. Y. Supp. 287.

¹⁵ *Bailey v. Fayette Gas Fuel Co.*, 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771; *Louisville Gas Co. v. Dulaney*, 100 Ky. 465; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; *Jones v. Rochester Gas etc., Co.*, 7 N. Y. App. Div. 465; 29 N. Y. Supp. 1105; *New Orleans Gaslight, etc., Co. v. Paulding*, 2 Rob. (La.) 378; *Portland Natural Gas Co. v. State*, 135 Ind. 54, 35 N. E. Rep. 818; 21 L. R. A. 639; *Harbison v. Knoxville Water Co.* (Tenn.), 53 S. W. Rep. 993; *Cincinnati, etc., Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

rules and regulations of the company, such as it has a right to adopt and impose upon its customers.¹⁶ A refusal of the customer to sign an agreement to abide by unreasonable rules will not deprive him of the right to a supply of gas.¹⁷ Instances of discrimination will appear in succeeding sections; but a few may be added here. Thus the company cannot require a deposit of money by a particular customer to secure the payment of its charge, when it does not require such deposits of all its customers.¹⁸ Where a water company laid its pipes in the street to supply certain persons with water who pay for the pipe under an agreement that if any one else was furnished water from the company should reimburse them for the amount they had paid, it was held that the company, notwithstanding this agreement, must supply all those whose property abutted upon the line, even though they had not paid anything on the pipe.¹⁹ Customers who are stockholders in the company must be treated as other customers, and cannot be given a preferential rate, although those favored constitute a majority of the owners of the company's stock.²⁰ It is no excuse that the amount the company by statute is authorized to charge, if it is charging other customers less than the amount of the charge to the one discriminated against.²¹ So it is an unjust discrimination to adopt a rule that it would furnish no gas to a tenant, and would only deal with the owner of the house occupied by the tenant or with his agent.²² But it is not

¹⁶ *Williams v. Mutual Gas Co.*, 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; *Portland Natural Gas Co. v. State*, *supra*; *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. L. Rep. 983; 42 S. W. Rep. 351.

¹⁷ *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 319; 82 Am. Dec. 679.

¹⁸ *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. L. Rep. 983; 42 S. W. Rep. 351.

¹⁹ *Hangen v. Albina Light and Water Co.*, 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424.

²⁰ *Crescent Steel Co. v. Equitable Gas Co.*, 23 Pittsb. Leg. (N. S.) 316.

²¹ *Griffin v. Goldsboro Water Co.*, 122 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240.

²² *State v. Butte City Water Co.*, 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238.

an unjust discrimination to charge a less rate to a manufacturer using a certain amount in one plant than is given a manufacturer operating several disconnected plants, although using as much as the larger manufacturer.²³

§527. Failure of supply of natural gas.— Discrimination.

Another phase of discrimination is a refusal to supply new customers because of lack of gas to supply both them and its old customers. So long as a gas company occupies the streets of a municipality with its pipes it must serve all alike whose property abutts upon the street occupied by them. A defense of its inability to supply all its customers was brought forward by a natural gas company organized to furnish gas at actual cost; but the court held it was not a sufficient defense to an action to compel gas to be furnished to a new customer. "The legal effect of the answer," said the court, "is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine Street in front of her house has been dug up and her property made servient to the use of the appellee in laying its pipes, and in carrying forward its business, and the right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee had laid its pipes, or is held of right by none. The legislature alone can authorize the doing of the things done by the appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Appellee's contract is with the State

²³ *St. Louis Brewing Ass'n v. St. Louis (Mo.)*, 37 S. W. Rep. 525. *inate between consumers. Rierker v. Lancaster*, 14 Lanc. L. Rev. 393. A municipality cannot discrim-

and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority or superiority of right among those who possess the right in common. That the beneficial agency shall fall short of expectations can make no difference in the right to participate in it on equal terms. So if the appellee has found it impossible to procure enough gas fully to supply all, there is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed us to no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas and other like companies and has been many times discussed by the courts and no statute has been deemed necessary to aid the courts in holding that when a person undertakes to supply a demand which is affected with a public interest, it must supply all alike who are alike situated, and not discommode in favor of, nor against any."²⁴

§528. Supply only to abutting property owners.

The general rule is that a gas company is required to supply only property abutting upon the company's lines or mains. There are many *dicta* to this effect.²⁵ But this question is often

²⁴ *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; *Rierker v. Lancaster*, 14 Lanc. L. Rev. 393.

²⁵ *Griffin v. Goldsboro Water Co.*, 122 N. C. 206; 30 N. E. Rep. 319; 41 L. R. A. 240; *Portland Natural Gas and Oil Co. v. State*, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; *Shepard v. Milwaukee Gas-light Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Commonwealth v. Wilkes-Barre Gas Co.*, 2 Kulp 499; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655;

regulated by a statute or ordinance frequently requiring the company to furnish gas to persons not upon its lines; as where they live within a "reasonable distance from the line of main pipes," in which event what is a "reasonable distance" is a question for the courts.²⁶ Where a statute required a company to furnish gas to the occupant of a building within 100 feet of any of its mains, it was held that the 100 feet was the space between its nearest main and the nearest portion of the building, and not to the portion for which gas was desired.²⁷ Of course, if there is a special contract existing between the would-be consumer and the company, then it is not a question whether or not the consumer is an abutting property owner, or his property lies within the prescribed distance; and even though the company is not bound to supply the applicant gas, by reason of the fact that his property is too remote, yet if it accept his application, with a full knowledge of that fact, it cannot deny him the right to the gas after such acceptance. No doubt the company can require of such an applicant an extra price for the gas, and for putting in pipe to his premises; for the whole matter lies in a special contract and not in a general duty to supply the public.

§529. Extension of mains or pipes.

A gas company is not bound to extend its mains or pipes to territory not occupied by it, unless a statute, or a binding ordinance, its charter or a contract requires it to do so, even though it have the privilege to occupy any street or all the streets of the municipality. But the matter of extension of mains almost universally is governed by a statute or the company's contract (usually embodied in an ordinance) with the municipality. Sometimes the municipal governing body has

46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771: Even though the line was paid for by other consumers, so long as it laid in the street. *Hangen v. Albina Light and Water Co.*, 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424.

²⁶ *West Hartford v. Hartford Water Com'rs*, 68 Conn. 323; 36 Atl. Rep. 536.

²⁷ *Jones v. Rochester Gas, etc. Co.*, 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105; affirmed 156 N. Y. 678; 52 N. E. Rep. 1124.

the power to order and enforce an extension of the mains; and in other instances the gas company is bound to extend a main only upon application of a certain number of persons agreeing to take gas.

§530. Inspection of premises.

Elsewhere has been discussed the right of a company to inspect the meter and so much of the pipe as lies between the meter and the company's mains,— or as it is frequently called, the supply pipe.²⁸ The right of the company, however, to inspect the house pipes, chandeliers, gas burners, furnaces, stoves and heaters in which gas is burned, is another question. In the case of furnaces, stoves and heaters where the company has lawfully reserved the right to insist upon the use of certain kinds, there is no doubt of the right of the company to insist upon an inspection at proper times under proper limitations, to see if their requirements have been complied with. And perhaps the company has the right to insist upon an examination of the pipes, burners and chandeliers when application is made, to see if the house or building is equipped for the use of gas, although there is some doubt on the question; for the company is not bound to furnish gas to an applicant not prepared to properly receive it.²⁹ Thus in a New York case it was said "As the company have no control over the piping, does not put it in, and is not consulted about it, the principle upon which it might be held liable, in cases of this character, at the time of the first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it, and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condi-

²⁸ See *Young v. Southwark, etc.*, Co., 69 L. T. 144; 41 W. R. 622; 57 J. P. 806; 5 R. 432, and *Wilkes-*

Barre Gas Co. v. Turner, 7 Kulp 399.

²⁹ *State v. New Orleans, etc.*, Co. (La.), 32 So. Rep. 179.

tion of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination, at frequent intervals, of all the buildings in the city in which gas was used. This would be so onerous as to be practically impossible of execution; because of the expense to the company."³⁰ No doubt exists, however, that a company may adopt a rule providing for inspection, upon proper notice given of the time when it would be made; and perhaps, the rule might provide for inspection at any time during business hours of the day.³¹ And an agreement on the part of the consumer to permit an inspection is binding upon him.³² Where a gas company, upon contract with the owner of the property, laid a supply pipe from it main to his house; and gas escaping because of a defect in the pipe, causing an explosion, the company was held liable.³³ This liability would, of course, carry a right to enter upon the premises to inspect the supply pipe. But where the owner of the property put in the supply pipe, which became defective after use, and an explosion occurred; it was held that the company was not liable, because of the fact that the owner of the property had put in the pipe. From this it would seem that the company had no right to inspect the supply pipe.³⁴

§531. Mandamus to compel supply.

Any person whose property abuts upon a gas company's line, (and a tenant is such a person), and who has complied with the rules and regulations of the company, and prepared his house or building for the reception of gas, and is not in arrears for gas supplied in the manner and form heretofore discussed,³⁵ may compel the company by a writ of mandamus to supply him with gas, if it refuses or neglects to do so upon proper application

³⁰ *Schmeer v. Gaslight Co.*, 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653.

³¹ *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539; 70 Am. Dec. 479.

³² *Wright v. Colchester Gas Co.*, 30 Gas J. 336.

³³ *Burrows v. March Gas and*

Coke Co., L. R. 7 Ex. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

³⁴ *Henderson v. New Castle and Galeshead Gas Co.*, 37 Sol. J. 403.

³⁵ *State v. New Orleans, etc., Co.* (La.), 32 So. Rep. 179.

made.³⁶ So mandamus will lie to compel a deputy inspector of gas meters for the city to inspect the consumer's meter, and if found correct, to seal or stamp it, where a statute requires all meters to be used to be examined, sealed and stamped before user.³⁷ To entitle the applicant to the writ, it is not necessary that he should have an interest in the company different from that held by other citizens; and it is no defense that he is already supplied by another company.³⁸ But the consumer must be ready to receive the gas when he makes his application for it and when he applies for a writ of mandamus; for a company should not be subject to the costs and annoyance of such a proceeding where a customer is not ready to use the gas.³⁹ If the company has demanded an illegal rate, it is not necessary for the consumer to tender the amount actually payable, where the rate is payable in advance, before bringing his action; but in his petition he may state his ability to pay and a willingness to do so upon granting the writ or before any gas is actually furnished.⁴⁰ The duty to supply gas includes turning it on when applied to for that purpose, the proper connections having been made, the meter furnished where the company is bound to furnish one.⁴¹ As a rule the right to the writ is limited to those whose property abuts upon the company's mains or pipes;

³⁶ Richmond, etc., Gaslight Co. v. Middletown, 59 N. Y. 228; 1 T. and C. 143; People v. Manhattan Gaslight Co., 45 Barb. 136; 1 Abb. Pr. (N. S.) 404; 30 How Pr. 87; State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Portland Natural Gas and Oil Co. v. State, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639; Hangen v. Albina Light and Water Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424; Crumley v. Watauga Water Co., 99 Tenn. 420; 41 S. W. Rep. 1058; Bloomfield, etc., R. R. Co. v. Richardson, 63 Barb. 437; Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W.

Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66. *Contra*, Commercial Bank v. London Gas Co., 20 Up. Can. Q. B. N. C. 233; State v. New Orleans, etc., Co. (La.), 32 So. Rep. 179.

³⁷ *In re McDonald*, 16 N. Y. Misc. Rep. 304; 39 N. Y. Supp. 367.

³⁸ Portland Gas Co. v. State, *supra*.

³⁹ Portland Gas Co. v. State, *supra*; Shepard v. Milwaukee Gaslight Co., *supra*.

⁴⁰ Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

⁴¹ Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653.

and it is not awarded to those to whom the company would not be compelled to extend its mains, especially if the cost of the extension would be out of proportion to the income that would be received.⁴³ But this question is often regulated by statute or an ordinance requiring the company to extend its mains to regions not occupied by it upon demand of a prospective customer or of a certain number of customers. It is no defense to the writ that the company has not enough gas,— as natural gas,— to supply its then customers; and to compel them to take on additional customers would injure their present customers.⁴⁴ If the company would have the right to turn off the gas, if it were supplying it, because of a failure of the applicant to pay past bills that he owes, then he cannot successfully insist upon his rights to the writ; and this is true even though they had furnished him gas upon his application after such bills were due.⁴⁵ A person who intends to make only occasional use of the gas is not entitled to the writ as, for instance, to use it only when the electric light in his house should fail.⁴⁷

§532. Mandamus to compel furnishing of gas to a city.

There is no doubt that a municipality may compel a gas company to furnish gas under a contract it has with it, the same as a private individual; and is not compelled to resort to an action for damages.⁴⁸

§533. Penalties for failure to supply gas.— Damages.

Often statutes inflict penalties upon a gas company for a neglect or refusal to furnish gas. This is especially true in

⁴³ *State v. Consumers' Gas Trust Co.* *supra*; *Hangen v. Albina Light and Water Co.*, *supra*.

⁴⁵ *State v. Consumers' Gas Trust Co.*, *supra*.

⁴⁶ *People v. Manhattan Gaslight Co.*, 45 Barb. 136; 30 How. Pr. 87; 1 Abb. Pr. (N. S.) 404.

⁴⁷ *Smith v. Capitol Gas Co.*, 132 Cal. 209; 64 Pac. Rep. 258; *Fleming v. Montgomery Light Co.* (Ala.), 13 So. Rep. 618; *Adams Ex-*

press Co. v. Cincinnati Gaslight and Coke Co., 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18.

⁴⁸ *Toledo v. N. W. Ohio Natural Gas Co.*, 5 Ohio C. C. 557; 3 Ohio Cir. Dec. 273; *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; 18 N. W. Rep. 286; 4 Am. and Eng. Corp. Cas. 66; *People v. New York, etc., Water Co.*, 56 N. Y. Supp. 364.

England. Thus a statute of that country⁴⁹ provides that if it be shown before any two justices of the peace "that any day the gas supplied by the undertakers is under less pressure, of less illuminating power, or of less purity than it ought to be according to the provisions of" that or of a special act referred to, "the undertakers shall in every such case forfeit and pay to the local authority or other persons making application for testing the gas such sum not exceeding twenty pounds, as the justices shall determine." It was held that this statute applied to a case where the company improperly cut off the gas, for the reason that a refusal or neglect to supply gas was a neglect or refusal to supply it under the pressure the statute required.⁵⁰ Under this statute the penalties form the only remedy, no action lying for damages.⁵¹ Under this and similar statutes it is held in that country that the consumer cannot set up as a defense the gas supplied was of an inferior quality, such a defense being only ground for claiming a fine from the company.⁵² In New York it was held that the company was not liable to place a gas meter on plaintiff's floor, where he resided in an apartment house, if gas was furnished the building, unless he put in a separate service or supplying pipe.⁵³ A statute requiring a gas company to supply the owner or occupant of a building rendering the company liable to only one action to recover a penalty, for a failure to supply gas, of ten dollars, and the further sum of five dollars for every day of refusal; and a subsequent action for penalties accruing during the continuance of the default in the absence of a new application cannot be main-

⁴⁹ 34 and 35 Vict. [1871], Ch. 41, Sec. 36.

⁵⁰ *Commercial Gas Co. v. Scott*, L. R. 10 Q. B. 400; 44 L. J. M. C. 171; 32 L. T. (N. S.) 765; 23 W. R. 874; 44 L. J. Q. B. 715.

⁵¹ *Atkinson v. New Castle W. W. Co.*, L. R. 2 Exch. Div. 441; 46 L. J. Exch. 775; 25 W. R. 794; 36 L. T. 761 (reserving L. R. 6 Exch. Div. 404; 20 W. R. 35, and disapproving *Couch v. Steel*, 3 E. and B.

402); *Clegg v. Earby Gas Co.* [1896], 1 Q. B. 592; 65 L. J. Q. B. 339. See *Johnston v. Toronto Consumers' Gas Co.* [1898], App. Cas. 447; 78 L. T. 270.

⁵² *Porquay Gas Co. v. Carter*, 32 Gas J. 490; *Great Central Gas Consumers' Co. v. Tallis*, 3 Gas J. 5. See *Gaslight and Coke Co. v. St. George*, 42 L. J. Q. B. (N. S.) 50.

⁵³ *Ferguson v. Metropolitan Gaslight Co.*, 37 How Pr. 189.

tained.⁵⁴ Under the New York statute before the penalty is incurred, an application must be presented, stating, among other things, the number of lights (and in case of an electric lighting company, how much power) is required, especially where the company at the time it receives the application requested such information.⁵⁵

⁵⁴ *Jones v. Rochester, etc., Co.*, 168 N. Y. 65; 60 N. E. Rep. 1044; reversing 64 N. Y. Supp. 1138.

In *Jones v. Rochester, etc., Co.*, 39 N. Y. Supp. 1105, 1110; 7 N. Y. App. Div. 465; affirmed 158 N. Y. 678; 52 N. E. Rep. 1124, it was held that a succession of penalties under this statute may be recovered in successive actions. In this case there was a dispute between the customer and company.

The statute referred to in these cases did not apply to natural gas companies organized under the "business corporation law." *Wilson v. Tennant*, 70 N. Y. Supp. 2; 61 N. Y. App. Div. 100; affirming 65 N. Y. Supp. 852; 32 Misc. Rep. (N. Y.) 273.

⁵⁵ *Andrews v. North River, etc., Co.*, 23 N. Y. Misc. Rep. 512; 51 N. Y. Supp. 872.

In England where a statute required water rates to be paid quarterly in advance, a water company is not liable to a penalty for a failure to supply water if the complainant has not paid the rate in advance, although it is not the custom of the company to take prepayment. *Kyffin v. East London W. Co.*, 66 Gas Jr. 243; *Thorn v. East London W. Co.*, 66 Gas Jr. 189; *Sheffield W. Co. v. Brooks*, 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P.

548. See *Sheffield W. Co. v. Wilkinson*, 4 C. P. Div. 410.

The laws of New York, 1859, Ch. 3311, Sec. 6, imposing a penalty on gaslight companies, which, for ten days after an application for gas neglects to supply it, applies where, although gas has been furnished within the ten days, there has been a neglect to give a continuous supply. *Meiers v. Metropolitan Gaslight Co.*, 11 Daly 119.

In Alabama a municipal corporation may adopt an ordinance imposing a fine or imprisonment on an officer or employee of a water company for the exaction of a rate in excess of that stipulated in a contract between the company and the city for a supply of water for the city and its citizens, but not for the commission of an act authorized by such contract. *Crosby v. Montgomery*, 108 Ala. 498; 18 So. Rep. 723.

A municipality cannot adopt an ordinance requiring a railroad company to maintain a particular kind of light at its crossings in its municipal boundaries, though it may require it to maintain a sufficient light to protect travelers. *Cleveland, etc., Ry. Co. v. Connersville*, 147 Ind. 277; 46 N. E. Rep. 579; *Contra, Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121.

§534. Damages for failure to supply gas.—Sickness.

Where a company undertakes to supply a customer of a municipality with gas under an ordinance requiring it to do so, or under its general public duty, and it fails to do so, especially after it has begun to supply him, it will be liable to him in an action of tort for all damages traceable to the wrong done, arising without an intervening agency and without the fault of the injured party. And it is also a tort, under such circumstances, where a contract existing between the company and the consumer, such as is usually entered into by consumers in a municipality. "The failure to perform such a contract is in itself a 'tort.'"⁵⁶ In such an instance it is no defense for the company that it did not have the gas to furnish or enough to furnish the full amount it had agreed to furnish if it fully supplied other customers; nor is it a defense that the consumer could have recovered back an amount of the sum he paid proportionate with the amount of gas it had failed to supply. In such an action the consumer may show that other consumers in buildings received an insufficient supply, where it is shown that such buildings were attached by means that would furnish as much or more gas than the attachment at his own stove. If the company take pay for the gas and retain it, it is no excuse that the supply of gas failed, and it, for that reason could not keep its contract. Nor is it a defense that the consumer removed his mixer and burned the gas without using it, as the rules of the company and his contract with it required, it having received pay for the gas in advance.⁵⁷ Where there is a failure to supply merely illuminating gas, the consumer has a right to recover back not only what he has paid for the gas

⁵⁶ *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771; *Indiana, etc., Gas Co. v. Anthony*, 26 Ind. App. 307; 58 N. E. Rep. 868; *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21; 40 W. N. C. 553; 28 Pittsb. L. J. (N. S.) 65. (This is especially true if the contract is

only a statement of the reasonable conditions under which the company was required to perform its duty.) *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318; 82 Am. Dec. 679.

⁵⁷ *Indiana, etc., Gas Co. v. Anthony*, 26 Ind. App. 307; 58 N. E. Rep. 868.

not furnished, but also the damages he has suffered in his business, as well as for the inconvenience and annoyance experienced by him in his business, if it was to be supplied for the purpose of lighting up his business establishment, arising out of the refusal to furnish gas.⁵⁸ This, of course, would include loss of profits. And where the owner of a business house prepared it ready to receive the gas, it was held that he could recover from the company refusing him gas the depreciation of the property for sale or lease, and the expense of restoring the property to a proper condition, divested of the gas pipes, in addition to other damage legitimately flowing from such refusal.⁵⁹ An aeronaut of some celebrity brought suit to recover damages estimated at over 500 dollars, occasioned by a failure of a gas company to keep a contract to supply his balloon with gas, on an occasion of an intended ascent in a city; and it was held that the plaintiff was entitled to maintain the action.⁶⁰ But a boarding house keeper was not allowed damages for loss of the profits she would have derived from her boarders who left because of a failure of the company to furnish gas.⁶¹ Yet where a natural gas (or other) gas company undertakes to furnish gas for heating purposes, and fails to do so, it will be liable, after notice of the probable effects of such failure and the consumers' inability to procure other fuel, in damages, for sickness occasioned thereby to the consumer and his family, even for the death of his child or wife,⁶² unless the company show that it was beyond its power to furnish the gas.⁶³ Where a

⁵⁸ *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318; 82 Am. Dec. 679; *Baltimore Gaslight Co. v. Colliday*, 25 Md. 1; *Whitehouse v. Liverpool, etc., Co.*, 5 C. B. 798; 5 M. Gr. and S. 798; *Kokomo, etc., Co. v. Albright*, 18 Ind. App. 151; 47 N. E. Rep. 682, rental of houses recovered.

⁵⁹ *Baltimore Gaslight Co. v. Colliday*, 25 Md. 1; *Bedding v. Imperial Gaslight Co.* 7 Gas J. 418.

⁶⁰ *Hampton v. Oxford Gas Co.*, 3 Gas J. 64.

⁶¹ *Morey v. Metropolitan Gas Co.*, 6 J. and S. (N. Y.) 185. The soundness of this decision may well be doubted.

⁶² *Coy v. Indianapolis Gas Co.*, *supra*; *Indiana, etc., Gas Co. v. Anthony*, *supra*; *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21; 40 W. N. C. 553; 28 Pittsb. L. J. (N. S.) 65.

⁶³ *Coy v. Indianapolis Gas Co.*, *supra*.

company enters into a contract to furnish a glass factory with gas to run its pots and failed to keep it, the glass business being new in that vicinity, and the expense necessarily and actually incurred in organizing the factory, its fair rental value when idle, if it had any, and if it had none, the interest on the money invested therein, together with the interest on any idle working capital, the value of which had been lost by a violation of the contract, the cost of bringing new and skilled workmen from a distance, none being in that vicinity; the cost of their transportation, and the compensation agreed or required to be paid for the service of the glass company's affairs may be treated as a part of the necessary expenses and damages recoverable.⁶⁴ It is no defense that the insufficient supply was occasioned by the freezing of the gas mains, if the company was careless in protecting them from the frost; and the presumption is that the gas mains would not have frozen up if properly protected.⁶⁵ If the company improperly cut off the gas, to enforce the payment of a bill for which the consumer was not liable to pay, it will be liable for the damages thereby occasioned.⁶⁶ But a consumer cannot recover damages for a failure to supply gas under a contract giving him an illegal preference,—as with the directors and stockholders,—for all consumers within a municipality must be served alike.⁶⁷

§535. Limiting liability for failure to supply gas.

A company has no right or power to limit its liability to furnish a sufficient supply of gas within a municipality. A duty is imposed by law to supply gas against which it cannot shield itself by a contract with the customer.⁶⁸ If the supply

⁶⁴ Paola Gas Co. v. Paola Glass Co., 56 Kan. 614; 44 Pac. Rep. 621.

⁶⁵ Stock v. Boston, 149 Mass. 410; 21 N. E. Rep. 871. Not liable in case of frost of an exceptional character. *In re Richmond Gas Co.* [1893], 1 Q. B. 56.

⁶⁶ Merrimac River Saving Bank v. Lowell, 152 Mass. 556; 26 N. E. Rep. 97; 10 L. R. A. 122.

⁶⁷ Shoenberger v. Equitable Gas Co., 22 Pittsb. L. J. (N. S.) 347; Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. Leg. J. (N. S.) 316.

Where no pecuniary loss is shown, the damages recoverable are nominal. *Detroit Gas Co. v. Moreton, etc., Co.*, 111 Mich. 401; 69 N. W. Rep. 659.

⁶⁸ Sec. 525.

in case of natural gas, should fail, that would be a defense, in case the company had made all efforts to furnish the gas; for natural gas is an article that cannot be manufactured, a quite different situation from an instance of supplying artificial gas. But it is quite another proposition where the company is under no duty to furnish gas. There the company may limit its liability; for the right to gas in that case rests wholly upon contract. Thus, in case of natural gas the contract may be to furnish it for a plant so long as the company has gas, and the contract is not void for indefiniteness, even though the consumer use gas for domestic purposes.⁶⁹ Where a company agreed to furnish gas to certain customers so long as with ordinary diligence and outlay it could procure gas under the contracts then ordinarily in use by gas companies, it was held that its "diligence and outlay" was to be measured as of the date of the contract, and not under conditions entirely altered.⁷⁰

§536. Application for gas.

A gas company may require the applicant for gas to sign a written application, containing a general description of the premises to be supplied and an agreement to abide by the rules and regulations of the company.⁷¹ But if any of the rules are unreasonable, the applicant will not be bound by them, even though he agree to them; for his agreement is under the nature of a compulsion, to secure a service to which he is otherwise entitled to have. In a contest, the court will determine whether or not the rules are reasonable, of any particular one of which complaint is made. These rules may be embodied in the application; or may be made a part of it by apt words of reference thereto. But even this is not necessary; for the applicant will

⁶⁹ *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; 47 N. E. Rep. 147; *Black Lick v. Saltsburg*, 139 Pa. St. 448; 21 Atl. Rep. 432; *Whitman v. Fayette Fuel Gas Co.*, 139 Pa. 492; 20 Atl. Rep. 1062.

⁷⁰ *Crescent Steel Co. v. Equitable Gas Co.*, 23 Pittsb. L. J. (N. S.) 316.

⁷¹ *Williams v. Mutual Gas Co.*, 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479; *State v. New Orleans, etc., Co. (La.)*, 32 So. Rep. 179.

be bound by all reasonable rules of the company brought to his attention without an express agreement concerning them.⁷² If only an oral application is made, and the company refuse to supply gas for a particular reason, not refusing because a written application is not made, it thereby waives its right to demand a written application, although its rules require it.⁷³ The company may reserve the right to cut off the gas to preserve itself from fraud or abuse; but it cannot assume to itself the whole power to decide upon the question of fraud or abuse, without notice, without trial, and upon its own mere motion.⁷⁴ Nor can it insert in the application an agreement or adopt a rule that the applicant, after admission of gas into his pipes, must not disconnect or open them for repairs or extensions, or otherwise, without a permit from the company, under a penalty of three times the amount of damages sustained.⁷⁵ Where a rule of the company required the application to be in writing, the general agent and manager of the business of a merchant residing in another and distant city, but having an extensive mercantile business in the city where the business is conducted, may authorize one of the clerks to make the demand for the merchant for a supply of gas in the city where such business is being carried on.⁷⁶ And a company cannot reject an application of a tenant on the ground that it had adopted a rule to deal only with the owner or his agent of the property to which gas is to be supplied.⁷⁷ Notice to supply gas, left with a person at the company's office at work around the office and behind the desk, where such person had attended to previous notices, and who testified that he was a clerk in the employ of the company, having charge of job work, surface work and the gas stove business, was held sufficient to bind the company, and render it

⁷² *Shiras v. Ewing*, 48 Kan. 170; 29 Pac. Rep. 320.

⁷³ *Shepard v. Milwaukee Gaslight Co.*, *supra*.

⁷⁴ *Shepard v. Milwaukee Gaslight Co.*, *supra*.

⁷⁵ *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; 70 Am. Dec. 479.

⁷⁶ *Shepard v. Milwaukee Gas Co.*, 11 Wis. 234.

⁷⁷ *State v. Butte City Water Co.*, 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238.

liable to a penalty for failure to comply therewith.⁷⁸ It is a sufficient defense in a suit for damages incurred by reason of a failure to furnish gas that the plaintiff refused to sign the rules and regulations of the defendant, but that fact must be set up specially by answer. Yet the conduct of the gas company may have been such as to preclude such a defense; as where it has always rested its refusal on other grounds. In such an instance it waived all other defenses.⁷⁹

§537. Rules and regulations.

A gas company has the right to adopt rules and regulations under which it will supply its customers; but these rules must be reasonable and not impose an undue burden upon the customer.⁸⁰ Whether or not the rule or regulation is a reasonable one is a question for the court. All contracts are made subject to such rules.⁸¹ A few instances of the reasonableness or the unreasonableness of rules and regulations have already been

⁷⁸ Jones v. Rochester Gas, etc., Co., 7 N. Y. App. Div. 405; 39 N. Y. Supp. 1105.

In this case it was also held that a gas company is subject to separate penalties for a refusal to supply gas at the residence and also at the business office of an applicant, under a statute providing that if a gas company refuse or neglect to supply gas for ten days upon application therefor it shall forfeit and pay to the applicant the sum of ten dollars and the further sum of five dollars for every day during which the refusal or neglect continues. In this case it was also held that the consent of the applicant to the removal of the meter from the premises to be supplied during the controversy over his liability for a specified amount of gas would not prevent him from recovering the penalty.

⁷⁹ Shepard v. Milwaukee Gas Co.,

11 Wis. 234. See Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

⁸⁰ Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Portland Natural Gas Co. v. State, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; State v. Butte Water Co., 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238; Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Harbison v. Knoxville Water Co. (Tenn.), 53 S. W. Rep. 993; Pocatello Water Co. v. Standley (Idaho), 61 Pac. Rep. 518.

⁸¹ Shiras v. Ewing, 48 Kan. 170; 29 Pac. Rep. 320.

given; and other instances will be given hereafter. But it may be added that a rule providing that if a customer waste water, when not furnished by meter, his supply may be cut off, is a reasonable one;⁸² and perhaps the same would be true if the water was furnished by meter, if the waste was so great that the company could not, by reason of such waste, supply its other customers with a sufficient supply. A rule providing that after gas has been admitted into a pipe, the pipes should be neither opened, extended, nor disconnected, whether they are opened, disconnected or extended for repairs or otherwise, without the company's permit, and if the rule in these particulars is violated the consumer would be required to pay triple damages, is invalid; for the company had no power to impose penalties and make a customer agree to the right to impose them if he violated this particular regulation. Another rule of the same company providing that it should have the right to shut off the gas, "in order to protect itself from fraud" was held void; for such a question falls within the province of the courts, to which the company must resort if it would protect itself. A still further rule provided that the company should have the right to enter the house at all times to examine the whole apparatus and to remove the meter and service pipes, and this was held invalid, because it was too general.⁸³ It is the duty of the company to inform a customer of its rules in order to bind him; but if he knows them it will not be necessary to inform him. It may be shown that he became aware of them by seeing them printed on bills presented to him.⁸⁴

§538. Subscribing to rules and regulations.

If the rules and regulations of a company are reasonable, the company may require an applicant for gas to subscribe to

⁸² *Shiras v. Ewing*, 48 Kan. 170; 29 Pac. Rep. 320.

⁸³ *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539; 70 Am. Dec. 479.

⁸⁴ *Brass v. Rathbone*, 153 N. Y. 435; 47 N. E. Rep. 905; affirming 8 N. Y. App. Div. 78; 40 N. Y. Supp. 466.

A company may require the consumer to prepare his plumbing according to certain rules it has adopted, and to present a report and certificate of a plumber certifying that he had complied with its rules. *State v. New Orleans, etc., Co. (La.)*, 32 So. Rep. 179.

them, or agree in writing to be governed by them,⁸⁵ and if he refuses it is not bound to furnish him gas. But if they are unreasonable, he is not bound to subscribe to them, nor agree to abide by them; and regardless of them he may maintain an action to compel the company to furnish him with gas.⁸⁶ In an application for a writ of mandamus to compel a company to supply gas, it must be averred that the applicant is ready to comply with all reasonable rules and regulations of the company; but if any of its rules are illegal, then such illegality must be especially set up and described, and an averment made that he is ready to abide by all the other rules of such company.⁸⁷ A company by insisting upon a customer to sign an application binding him to abide by illegal rules waives its right to insist that he failed to sign a proper application in an action against it for damages because of its failure to furnish gas.⁸⁸

§539. Price to be charged.

If a statute or an ordinance fixes the price the company may charge for gas, such company cannot exceed the price named therein, although it may charge less, unless such statute or ordinance is invalid by reason of it having been enacted after the grant of the company's franchise, without any reservation to control the price of gas furnished. A contract with a municipality to furnish its citizens gas at not to exceed a certain figure is one that a consumer within such municipality may enforce.⁸⁹ If the rates are not fixed, then the question is

⁸⁵ *Shepard v. Milwaukee Gaslight Co.*, 11 Wis. 234.

⁸⁶ *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539; 70 Am. Dec. 470; *State v. Sedalia Gaslight Co.*, 34 Mo. App. 501; 84 Mo. 202; *Andrews v. North River Electric Light, etc., Co.*, 23 Misc. (N. Y.) 512; 51 N. Y. Supp. 872; *Shepard v. Milwaukee Gaslight Co.*, 11 Wis. 234.

⁸⁷ See *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; 61 N. E.

Rep. 674; 55 L. R. A. 245; *Portland, etc., Co. v. State*, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639.

⁸⁸ *Shepard v. Milwaukee Gas Co.*, 11 Wis. 234; *Shepard v. Milwaukee Gas Co.*, 15 Wis. 318; 82 Am. Dec. 679.

⁸⁹ *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; 60 N. E. Rep. 1032; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429; 41 S. W. Rep. 1060.

one common to any transaction of buying or selling;⁹⁰ although there are a number of cases which hold that the acceptance of a charter or franchise by a gas company contains an implied agreement that the rates made shall be reasonable in amount; usually however, no effort is made to state what is or is not a reasonable rate.⁹¹ In such rates there can be no discrimination;⁹² not even by charging more for gas used for lighting than that used for heating or manufacturing.⁹³ Nor can the company make a special rate to those owning an interest in it.⁹⁴ But it has been held that a gas company may charge one rate in a neighborhood where it comes in competition with another company; and a higher rate where there is no competition, so long as the latter rates do not exceed the rate allowed by a statute. It is said a reasonable price paid by one is not made unreasonable because another pays less.⁹⁵ Where the ordinance by which a gas company gains admission to lay its mains in the street and supply the citizens of the municipality provides that gas shall be furnished to consumers upon such terms and conditions as the common council may thereafter determine, a duty is imposed upon the company to agree with the council on reasonable terms; and if the duty be disregarded, the court may compel obedience to the ordinance by a mandatory in-

⁹⁰ See *Noblesville v. Noblesville Gas Co.*, 157 Ind. 162; 60 N. E. Rep. 1032; *Philadelphia Co. v. Park*, 138 Pa. St. 346; 22 Atl. Rep. 86.

⁹¹ *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121; *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406; *Toledo v. N. W. Ohio Natural Gas Co.*, 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531.

⁹² *Griffin v. Goldsboro Water Co.*, 126 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240; *People's Gaslight and Coke Co. v. Hale*, *supra*; *Bellaire Goblet Co. v. Findlay*, 5 Ohio Cir. Ct. Rep. 418; *Dalzell v. Findlay*, 5 Ohio Cir. Ct. 435; 3 Ohio Cir.

Dec. 214; affirmed 27 Wkly. L. Bull. 128.

⁹³ *Bailey v. Fayette Fuel Gas Co.*, 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505; 11 Am. and Eng. Corp. Cas. (N. S.) 740; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744; *Bellaire Goblet Co. v. Findlay*, *supra*; *Dalzell v. Findlay*, *supra*; *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Ohio St. 336; 49 N. E. Rep. 121.

⁹⁴ *Crescent Steel Co. v. Equitable Gas Co.*, 23 Pittsb. Leg. J. (N. S.) 316.

⁹⁵ *Baltimore Gas Co. v. Colliday*, 25 Md. 1.

junction.⁹⁶ Under a contract to furnish gas "at two-thirds of the lowest average price at which gas shall or may be furnished" in five specified cities, it was held that the price must be determined by adding the five lowest cash prices in those cities, divide the sum total by five, and multiply the result by two-thirds.⁹⁷ The rate to be paid must be measured by the rate maintained in cities thus named, not at the time of the adoption of the ordinance, but with the fluctuation of rates in such cities. Thus in Illinois where the gas to be furnished was to be "of a quality at least equal to, and rates favorable as that furnished by" a certain company, it was held that the rate of that company at the time of the furnishing of the gas should be taken, and not its rate at the time of the passage of the ordinance. Therefore, the rates fluctuated with the rates of such company, and were really subject to its control.⁹⁸ And in Massachusetts where an ordinance provided that the gas should be furnished as cheaply as it was furnished in Boston, New York and Baltimore, it was held that it was not intended that the company should at all times furnish it as cheaply as it was being furnished in those cities at the time the ordinance was passed, but that the rate should vary with the rates in those cities.⁹⁹ Where a gas company in accepting an ordinance fix-

⁹⁶ Toledo v. N. W. Ohio Natural Gas Co., 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531.

In this case the petition for an injunction was held defective, it only stating that the council passed an ordinance fixing the price at reasonable rates which the company refused to recognize and was proposing to furnish gas at a price in excess of that named in the ordinance. Nothing was alleged that the company had not agreed with the council on a schedule, nor that the council had proposed one to the company, nor that the company had refused to negotiate with the council.

⁹⁷ Cincinnati v. Cincinnati Gaslight and Coke Co., 53 Ohio St. 278; 41 N. E. Rep. 239.

⁹⁸ Decatur Gaslight and Coke Co. v. Decatur, 120 Ill. 67; 11 N. E. Rep. 406; affirming 24 Ill. App. 544. At the time of the adoption of the ordinance the rate of the company referred to was over \$3.25 per thousand feet; but afterwards it reduced its rate to \$1.50, and it was held that the city was not liable to pay any higher price than the reduced rate.

⁹⁹ Worcester Gaslight Co. v. Worcester, 110 Mass. 353; Cincinnati v. Cincinnati Gaslight and Coke Co., 53 Ohio St. 278; 41 N. E. Rep. 239.

It must be alleged, in the complaint by a water company to have an ordinance fixing water rents to be paid by citizens declared void be-

ing the rates to be charged consumers expressly reserved all vested rights under its franchise, one of the provisions thereof being its right to fix its own prices, within reasonable limits, for gas, such reservation was held to apply to all uses of gas not specified in the last ordinance.¹⁰⁰ Where, under a special contract, a manufacturing company was supplied natural gas for fuel only, but used it for illuminating purposes also, it was held liable for the reasonable value of the gas used for the latter purpose, without regard to the price paid for that used for fuel.¹⁰¹ If an ordinance regulating the price of gas be amended so as to increase the price to be charged by a particular gas company only for a certain time, such amendment does not repeal the amended ordinance, and on the expiration of such time the prior ordinance is in force and prevails.¹⁰² If the company sees fit to supply gas at a lower rate than it is entitled to charge for it, or furnishes a gas of a better quality for fuel purposes than it is required to do, or if the same quality is furnished for fuel purposes that it is required to furnish for illuminating purposes, when it is under no obligation to fur-

cause in violation of an agreement with it that the rates to be fixed by the municipality should not be less than the prices charged in towns of the State similarly situated, that there is a substantial difference between the rates as fixed and those obtaining in the towns to which reference is made; and it is not sufficient to merely allege that the respective rates do not correspond, without showing wherein or to what extent there is a difference. *Leadville Water Co. v. Leadville*, 22 Colo. 297; 45 Pac. Rep. 362.

¹⁰⁰ *Noblesville v. Noblesville Gas Co.*, 157 Ind. 162; 60 N. E. 1032. The court seems to have overlooked the fact that by such a construction of the two ordinances it adopted a rule which discriminated, or might lead to discrimination, be-

tween consumers, a thing forbidden by the general principles of the law.

¹⁰¹ *Philadelphia Co. v. Park*, 138 Pa. St. 346; 22 Atl. Rep. 86.

¹⁰² *Thistlethwaite v. State*, 149 Ind. 319; 49 N. E. Rep. 156.

An application for water, subject to the rules and ordinances of the municipality, constitutes an express consent by the applicant to pay the rates charged. *Silkman v. Yonkers Water Comrs.*, 152 N. Y. 327; 46 N. E. Rep. 612; 37 L. R. A. 827; *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149; 42 W. N. C. 160; *Lancaster Hotel Co. v. Lancaster*, 7 Pa. Super. Ct. 159; 42 W. N. C. 164. But this is not the case if the rates are discriminating or unreasonable. *Griffin v. Golsboro Water Co.*, 122 N. C. 206; 30 S. E. Rep. 319.

nish it of so high a quality for fuel purposes,— that does not prevent it charging the full rate, or changing the supply for fuel purposes from the higher to the lower quality.¹⁰³ It is proper for a gas company to provide that if gas bills are not paid within a certain time after due,— as within ten days,— a small percentage will be added.¹⁰⁴

§540. Payment in advance.

Where gas is not furnished by meter measurement, and is furnished at so much per month, quarter or year, upon what is known as the "flat" rate, the company may require that it be paid for in advance; and a rule requiring payment in advance for three months is a reasonable one.¹⁰⁵ On an issue whether water rent was payable in advance, the transactions of the company and the consumer may be shown, to reveal their understanding as to the time when the payments were to be made.¹⁰⁶ In a case where it is necessary to make a tender,— the rent being

¹⁰³ *People's Gaslight and Coke Co. v. Hale*, 94 Ill. App. 406.

¹⁰⁴ *Tacoma Hotel Co. v. Tacoma Light and Water Co.*, 3 Wash. St. 316; 28 Pac. Rep. 516.

The company cannot add a charge of one dollar for turning on the gas where it has been turned off for failure to pay a bill, if the bill is paid and a request made that it be turned on again. *American W. W. Co. v. State*, 46 Neb. 194; 64 N. W. Rep. 711.

The assignee of a gas company's rights to furnish the inhabitants of a municipality gas, is bound by the agreement of the assignor to furnish gas for the streets and the municipal public buildings free of charge. *Freeport School District v. Enterprise Natural Gas Co.*, 18 Pa. Super. Ct. 73.

A company cannot increase the charge for gas supplied so as to cover the amount of a meter rent,

where a statute forbids a meter rent. *Buffalo v. Buffalo Gas Co.*, (N. Y.) 80 N. Y. Supp. 1093.

¹⁰⁵ *Harbison v. Knoxville Water Co.* (Tenn.), 53 S. W. Rep. 993.

¹⁰⁶ *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447; 31 So. Rep. 31.

In England where a statute requires water rents to be paid in advance, no penalty is incurred for a failure to furnish water unless a payment in advance is made or tendered, even if the company is in the habit of supplying water without such advanced payment. *Kyffin v. East London W. W. Co.*, 66 Gas. Jr. 243; *Thorn v. East London W. W. Co.*, 66 Gas. Jr. 189; *Sheffield W. W. Co. v. Brooks*, 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P. 548. See *Houlgate v. Surrey Consumers' Gas Co.*, 8 Gas. J. 261.

payable for the quarter in advance,— such tender will not be rendered invalid by failure to tender a fee charged for turning on the gas, if the company refuse to receive the sum tendered solely upon non-payment of an illegal charge. In such a case it waives a tender of the fee.¹⁰⁷

§541. Deposits.

It is a reasonable regulation to require an applicant for gas to make a deposit of a sum of money to secure the payment of rates, before gas shall be furnished.¹⁰⁸ But a company cannot require a particular person to make a deposit, when no regulation of a general character has been adopted.¹⁰⁹ The sum of two pounds has been held a reasonable sum to demand; ¹¹⁰ and so one hundred dollars, where sixty dollars worth a week was consumed.¹¹¹ Where the applicant for gas paid the amount demanded and immediately demanded it back; it was held that the company was justified in refusing him gas.¹¹² So where a consumer refuses to pay only so much of his bill as exceeded the deposit, because the company would not pay him interest upon it; and upon payment of such excess the company demanded from him a new deposit,— he in his contract agreeing to make a deposit,— it was held that, on his refusal to make it, it was justified in shutting off his gas supply.¹¹³ If the periodical gas bills greatly exceed the amount of the deposit, the company may demand that such deposit be increased; as where the deposit was fifteen dollars and the monthly gas bill forty-five. A request for the payment of the bill and an increase of the deposit at the same time does vitiate the demand for the in-

¹⁰⁷ Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

¹⁰⁸ Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Ford v. Brooklyn Gaslight Co., 3 Hun 621; Shepard v. Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Wright v. Colchester Gas Co., 30 Gas. J. 336.

¹⁰⁹ Owensboro Gaslight Co. v. Hildebrand, 19 Ky. Law Rep. 983; 42 S. W. Rep. 351.

¹¹⁰ Samuel v. Cardiff Gas Co., 18 Gas. J. 192.

¹¹¹ Williams v. Mutual Gas Co., *supra*.

¹¹² Littlewood v. Equitable Gas Co., 8 Gas J. 541.

¹¹³ Wright v. Colchester Gas Co., 30 Gas J. 336.

crease.¹¹⁴ If a company accept security in place of a deposit, it waives its right to such deposit, as where the company took the plaintiff's demand note for the amount of the deposit, and immediately demanded its payment, the applicant requesting a short delay in payment, it was held that it was an illegal act to at once cut off his supply of gas, for the security still existed.¹¹⁵ It has been held that the question whether or not the deposit was a reasonable one was one for the jury.¹¹⁶ The consumer has the burden to show that the deposit is unreasonable.¹¹⁷

§542. Discrimination in use.— Rates.

One rate cannot be adopted for those who use natural gas for light and another for those who use it for heat. The rate for both purposes must be the same. Thus where the rate for heat alone was fixed by the company at twelve and a half cents per thousand feet, and for both heat and light at twenty cents the rule of the company was held to be unreasonable and invalid. It was contended by the company that it was not shown that natural gas for illuminating purposes was of less value than it was for fuel, or that when used both for light and fuel it was not reasonably worth twenty cents; and for this reason it claimed that it had made no unjust discrimination against the complaining consumer. The record did not disclose how many feet the plaintiff had used for light and how many for fuel, and because of this fact it was contended that it could not be claimed there had been any discrimination as far as he was concerned.

¹¹⁴ *Ford v. Brooklyn Gaslight Co.*, 3 Hun 621.

¹¹⁵ *Fowler v. Chartered Gas Co.*, 17 Gas J. 908.

A few cases hold that unless the company's charter or a statute give it the right to insist upon a deposit, the company cannot demand it. *Spratt v. South Metropolitan Gas Co.*, 7 Gas J. 663. The payment of a water license under a threat to turn off the water in case of continued

refusal, is a payment under compulsion; and if the charge is excessive, the excess may be recovered back without tendering the amount really due. *Westlake v. St. Louis*, 77 Mo. 47.

¹¹⁶ *Bennett v. Eastchester Gaslight Co.*, 40 N. Y. App. Div. 169; 57 N. Y. St. Rep. 847.

¹¹⁷ *Bennett v. Eastchester Gaslight Co.*, *supra*.

The court brushed aside these contentions as without merit; for the reason that the classification of customers was arbitrary and unjust. "Under this rule," said the Court, "appellant [the gas company] did not profess to have any regard or consideration for the amount consumed for light. If any patron, using gas for heating his dwelling, also employed one jet about his dwelling whereby a small amount of natural gas was consumed each month for light, he was amenable and subject to the rule in like manner as the fuel consumer would be who used many jets about his premises for illuminating purposes. The amount consumed for light does not seem to be a feature of any importance within the meaning of the rule in question. Such a regulation, under the facts in this case when tested by the principle affirmed and sustained by the authorities, must certainly be held unreasonable, arbitrary and unjust."¹¹⁸ So a gas company incorporated to furnish heat and light cannot prescribe one price for gas used for heating and another for gas used for lighting, and that the price for gas for lighting should be measured by what the consumer would have to pay for a substitute, if gas could not be had.¹¹⁹

§543. Classification of customers.— Rates.

The Indiana Supreme Court seems to consider that a gas company has the right to classify its customers, and base its charges upon the classification, as indicated in the following

¹¹⁸ *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744.

The court distinguishes this case from *Philadelphia Co. v. Park*, 138 Pa. St. 346; 22 Atl. Rep. 86, by saying that it was a case where the gas company had agreed to furnish the defendant with gas for fuel only at a low price, but the company having taken gas from the mains for lighting purposes, it was liable to pay the market value for the amount of gas used in lighting, which was much higher than the

agreed price of gas for fuel only.

¹¹⁹ *Bailey v. Fayette Fuel Gas Co.*, 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505.

A statute forbidding a higher rate for water for "domestic purposes" than that specified for the use of water for a building, includes all uses which contribute to the health, comfort, and convenience of a family in the enjoyment of their dwelling as a home. *Crosbey v. Montgomery*, 108 Ala. 498; 18 So. Rep. 723.

language: "Counsel for the appellee concedes, and properly so, we think, that companies engaged in furnishing gas and water, etc., to the public may make classification in respect to their patrons or consumers and adopt reasonable rules and regulations for the control of such classes, but that the classification must be reasonable and impartial, and not arbitrary or unjust, of a discriminating character; but that due regard must be had to the rights of the citizens of the town or city depending upon such companies for their supply of water or gas, as the case may be, and that all occupying similar or like positions must be treated impartially."¹²⁰ In the case from which this quotation is made, the company had one rate for the manufacturer using its natural gas, and another for his residence and residences in general. But this rule was not drawn in question, and of course not passed upon. Whether or not such a rule is valid is not yet decided so far as the author knows; but it is difficult to see why, in accordance with the commercial practice of the day, a large consumer should not receive gas at a lower rate than a smaller one, all other things being equal.¹²¹

§544. Recovering back overcharges.

A consumer who pays an overcharge or illegal bill does not necessarily voluntarily pay it. In a measure he is under compulsion; for if he do not pay, his gas will be cut off, and his premises left without means of lighting. The gas company cannot claim successfully that the payment was voluntarily made, and thus retain the money; for it is public duty it was bound to perform at a lower price. The excess, therefore, paid over the amount of the legal rate may be recovered back, under the theory that it was a payment under compulsion.¹²² In the

¹²⁰ *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744.

¹²¹ See *St. Louis Brewing Ass'n v. St. Louis (Mo.)*, 37 S. W. Rep. 525; *Sheward v. Citizens' Water Co.*, 90 Cal. 635; 27 Pac. Rep. 439. See *State v. Goswell (Wis.)*, 93 N. W. Rep. 542.

¹²² *Pingree v. Mutual Gas Co.*, 107 Mich. 156; 65 N. W. Rep. 6; *Penn. Iron Co. v. Lancaster*, 17 Lanc. Law Rev. 161 (must pay under protest); *Indiana, etc., Co. v. Anthony*, 26 Ind. App. 307; 58 N. E. Rep. 868.

case just cited first below an ordinance prescribed the rate, and a recovery back of the excess was allowed, although such ordinance did not in terms confer a right of action to recover such excess. In this case the consumer paid the bill in ignorance of the legal rate. The ordinance provided that the legal rate should be the average rate in five certain cities, and it was held that the payment was not voluntary, though the consumer was negligent in not ascertaining such average rate.¹²³

§545. Collection of rents.—Action.

A gas company may provide that if its bill for rent is not paid within so many days, an additional amount will be exacted, — as if not within ten days, five per cent. will be added; but a provision also providing that if the bill is not paid within two months, the attachment will be cut off and not renewed until the rent due, including all expenses of cutting and turning on, and the rent, in case of a water company, for half a year be not paid, is void.¹²⁴ The gas company may maintain *assumpsit* to collect bills for gas furnished;¹²⁵ and if furnished to a partnership, although the premises are owned by only one of the partners, all are liable.¹²⁶ A surety for gas furnished is liable with the consumer, but not for a tenant succeeding to the person for whom he became responsible.¹²⁷ Where a receiver of the profits of a partnership agreed in writing, with the consent of the partners, to pay a back bill then due within six months,

¹²³ In England it is held that a private consumer cannot recover an overcharge made contrary to a statute providing that under certain circumstances the price of gas supplied a municipality by a gas company should be reduced, and empowering the corporation to check the annual audit of the company's accounts to ascertain if it is complying with the statute. *Johnston v. Consumer's Gas Co.*, 78 Law T. 270; [1898] A. C. 447; 67 L. J. P. C. 33.

An unlawful charge for a meter may be recovered back. *Capitol*

City Gas, etc., Co. v. Gaines, 20 Ky. L. Repr. 1464; 49 S. W. Rep. 462.

¹²⁴ *Dayton v. Quigley*, 29 N. J. Eq. 77.

¹²⁵ *London Gaslight Co. v. Nicholls*, 2 Car. and P. 365; *Preston v. Hayton & Roby Gas Co.*, 25 Gas J. 889; *Birmingham, etc., Co. v. Ratcliffe* L. R. 6 Ex. 224; *Hieronimus v. Bienville Water Supply Co.*, 131 Ala. 447; 31 So. Rep. 31.

¹²⁶ *London Gaslight Co. v. Nicholls*, *supra*.

¹²⁷ *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174.

and also undertook to pay future bills until further notice; it was held that he was liable for the past bills, the consideration being sufficient to enable the gas company to maintain *assumpsit*.¹²⁸

§546. Collection of rents by distress.

In some instances early statutes allowed gas companies to collect rents by distress. But distress does not lie when that rule prevails, for a gas stove let for hire to the consumer by the company.¹²⁹ And where a gas company was authorized by statutes to levy all sums for gas by distress, after one of its customers had filed a petition in bankruptcy, it was held that the company could not then collect the gas by distress.¹³⁰ This case was distinguished from an earlier case, in which a statute authorized a company to collect rent and charge for gas "by the same means as landlords are by law empowered to recover rent in arrear," where the court held that the rent or charges in arrear before the petition in bankruptcy was filed could be collected by distress of the goods of the bankrupt in the trustee's hands.*¹³⁰ Subsequently, however, under a similar statute, the right to relief by distress was denied.¹³¹

¹²⁸ *Hiberian Gaslight Co. v. Parry*, L. R. 4 Ir. 453.

If a lessor agree to pay "all water rates imposed or assessed upon the premises or on the lessor or lessees in respect thereof," he is not bound to pay for water supplied to the lessees for trade purposes. *In re Floyd* [1897], 1 Ch. 633; 66 L. J. Ch. 350; 76 L. T. 251; 45 W. R. 435.

Where a gas company covenanted to supply gaslight for each lantern of a parish, to the satisfaction of the defendant or its surveyor, in a certain manner and form set out in the contract, it was held that the parish could not refuse to pay for the gas on the ground that the com-

pany did not light the lanterns to the satisfaction of the defendant or its surveyor and did not perform the other covenants of the contract. — the performance of all the several stipulations of the gas company not being a condition precedent to the right to receive the money. *London Gaslight Co. v. Vestry of Chelsea*, 8 C. B. (N. S.) 215; 9 Gas J. 292.

¹²⁹ *Gaslight and Coke Co. v. Hardy*, 17 Q. B. Div. 619.

¹³⁰ *Ex parte Hill*, 6 Ch. Div. 63.

*¹³⁰ *Ex parte Birmingham, etc.* Co., L. R. 11 Eq. 615 (and see *ex parte Birmingham, etc., Co.*, L. R. 11 Eq. 204).

¹³¹ *Ex parte Harrison*, 13 Q. B. Div. 753.

§547. Shutting off gas for failure to pay.

If a consumer fails or refuses to comply with the rules or regulations of a gas company, such company, after bringing his attention to the rule violated, may shut off his supply of gas if he continues to violate it after notice given.¹³² Thus a rule that a consumer's supply of gas may be shut off if he becomes in arrears and fails to pay upon demand made, is valid, and in such an instance, after notice given, the company may shut off his gas supply.¹³³ And if a consumer has practically abandoned the use of gas, by adopting other methods of lighting, the company may cut off his supply of gas.¹³⁴ But a company cannot shut off a tenant's or landowner's gas because a former occupant or owner of the building has failed or refused to pay proper gas bills.¹³⁵ This rule, however, may be changed by a statute, or by a contract, or by an ordinance where the municipality furnishes gas to private consumers. Thus it was held

¹³² *Shiras v. Ewing*, 48 Kan. 170; 29 Pac. Rep. 320; *Commonwealth v. Philadelphia*, 132 Pa. St. 288; 19 Atl. Rep. 136 (as a rule requiring bills to be paid within ten days after presented, or the gas would be shut off).

¹³³ The right to shut off the gas exists in such an instance without such a rule. *People v. Manhattan Gaslight Co.*, 45 Barb. 136; 30 How Pr. 87; 1 Abb. Pr. (N. S.) 404; *Smith v. Scranton Gas and Water Co.*, 5 Lack Leg. N. 235; *Baltimore Gaslight Co. v. Colliday*, 25 Md. 1; *Appeal of Brum* (Pa.), 12 Atl. Rep. 855; *Morey v. Metropolitan Gaslight Co.*, 38 N. Y. Super. 185; *Bellaire Goblet Co. v. Findlay*, 3 Ohio C. Dec. 205; 5 Ohio Cir. Ct. 418; *McDaniel v. Springfield W. W. Co.*, 48 Mo. App. 273; *Mackin v. Portland Gas Co.*, 38 Ore. 120; 61 Pac. Rep. 134; 62 Pac. Rep. 20; 49 L. R. A. 596; *Tacoma Hotel Co. v. Tacoma Light and Water Co.*, 3 Wash. 316; 28 Pac. Rep. 516; 14

L. R. A. 669; *Pearson v. Phoenix Gas Co.*, 12 Gas J. 69; *Jenkins v. Columbia, etc., Co.*, 13 Wash. 502; 43 Pac. Rep. 328.

¹³⁴ *Adams Express Co. v. Cincinnati Gaslight Co.*, 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18. See *Smith v. Capital Gas Co.*, 132 Cal. 209; 64 Pac. Rep. 258.

¹³⁵ *Sheffield W. W. Co. v. Wilkinson*, L. R. 4 C. P. Div. 410; *People v. Manhattan Gaslight Co.*, *supra*; *Merrimac River Savings Bank v. Lowell*, 152 Mass. 556; 26 N. E. Rep. 97; *New Orleans Gaslight Co. v. Paulding*, 12 Rob. (La.) 378; *Dayton v. Quigley*, 37 N. J. Eq. 77; *Gaslight and Coke Co. v. Mead*, 45 L. J. M. C. 71; *Brass v. Rathbone*, 8 App. Div. N. Y. 78; 40 N. Y. Supp. 466; affirmed 153 N. Y. 435; 47 N. E. Rep. 905; *Turner v. Revere Water Co.*, 171 Mass. 329; 50 N. E. Rep. 634; *Morey v. Metropolitan Gas Co.*, 6 Jones & S. (N. Y.) 185.

that the city of Philadelphia, when it furnished gas, could adopt an ordinance and require payment of all arrear gas bills of former tenants of the premises before supplying present tenants.¹³⁶ A statute may make the charge for gas supplied a lien on the land, in which event the purchaser of the land will be bound to pay up all arrearage bills, even though such purchaser obtain title through a sheriff's sale.¹³⁷ In such an instance a statute is necessary to make the rent a lien,¹³⁸ unless a contract the equivalent of a mortgage be given.¹³⁹ But where a statute authorized a company "to stop the gas from entering the premises, service pipes or lamps of any" person refusing to pay for gas supplied, the company was held empowered to cut off the gas supplied to one set of premises of a consumer for default made by him in respect to another set of premises; it being deemed that the liability attached to the consumer and not to the premises.¹⁴⁰ A receiver appointed by court in behalf of the bondholders and carrying on the business, is not entitled to gas, under a statute authorizing a company to turn off the gas if the owner of the premises does not pay, without paying the arrears of the company for which he was appointed receiver; but even here there may be exceptions.¹⁴¹ But a contract to supply gas, and permitting the company to shut off the supply if bills be not paid as to any premises of the consumer, cannot be given a retroactive effect by allowing the company to shut off gas from the premises because of delinquent gas bills incurred for gas furnished at a house from which the consumer had moved before entering into such special contract.¹⁴² Nor can the company shut off the gas from all the

¹³⁶ *Commonwealth v. Philadelphia*, 132 Pa. St. 288; 19 Atl. Rep. 136; 46 Leg. Int. 210.

¹³⁷ *Appeal of Brumm (Pa.)*, 12 Atl. Rep. 855.

¹³⁸ *Turner v. Revere Water Co.*, 171 Mass. 329; 50 N. E. Rep. 634.

¹³⁹ *St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465; 33 N. E. Rep. 113.

¹⁴⁰ *Montreal Gas Co. v. Cadieux*, 68 L. J. P. C. 126; [1889] App.

Cas. 589; 81 Law T. (N. S.) 274; *Montreal Gas Co. v. Cadieux*, 11 Can. Q. B. 93.

¹⁴¹ *Patterson v. Gaslight and Coke Co.* [1896], 2 Ch. 476; 65 L. J. Ch. (N. S.) 709; 74 L. T. Rep. 640; *In re Marriage, etc.* [1896], 2 Ch. 663; *Gosling v. Gaskell*, [1897] A. C. 575.

¹⁴² *Lloyd v. Washington Gaslight Co.*, 1 Mackey 331.

consumers of several houses where he holds a separate contract for the supplying of each house.¹⁴³ But where a consumer failed to pay a bill for the house in which he resided, and he then moved into another house where the company supplied him with gas for a while and then discontinued it, it was held that he could not compel it to continue to furnish him with gas until he had paid his old bills.¹⁴⁴ A company, however, cannot enforce the payment of disputed bills by shutting off the supply of gas; and if it attempted to do so, it may be enjoined;¹⁴⁵ especially after it has received payment for a subsequent and undisputed installment.¹⁴⁶ A gas company is not justified in shutting off gas furnished free to a person who is wasteful in its use; but the court will regulate the supply. As where a consumer furnished free gas used 300,000 cubic feet in a year, while the largest consumer similarly situated used not over 64,000 during the same year, the court limited the supply to 150,000 cubic feet.¹⁴⁷ And in an instance where a municipality was to be furnished gas free for all municipal purposes for the privilege of laying gas pipes in its streets, the court refused to enjoin an excessive and wasteful use, remitting the company to its action at law.¹⁴⁸ A promise by a new tenant to pay all gas bills of the former tenant unpaid is without consideration, even though the gas company refused to furnish him gas without he agreed to its demand; and, therefore, the company cannot cut off his supply for a neglect to keep his contract in full.¹⁴⁹ A contract to supply natural gas so long as the

¹⁴³ *Baltimore Gaslight Co. v. Col-liday*, 25 Md. 1.

¹⁴⁴ *Mackin v. Portland Natural Gas Co.*, 38 Ore. 120; 61 Pac. Rep. 134; 49 L. R. A. 596 (rehearing denied, 62 Pac. Rep. 20).

¹⁴⁵ *Bienville Water, etc., Co. v. Mobile*, 112 Ala. 260; 20 So. Rep. 742; 33 L. R. A. 59; *Penny v. Rosendale, etc., Co.*, 14 Gas J. 927; *Sickles v. Manhattan Gaslight Co.*, 66 How. Pr. 314 (as where there was a dispute over the correctness of the meter measurement). *Con-*

tra, Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161.

¹⁴⁶ *Wood v. Auburn*, 87 Me. 287; 32 Atl. Rep. 906.

¹⁴⁷ *Graves v. Key City Gas Co.*, 93 Iowa 470; 61 N. W. Rep. 937; *Graves v. Key City Gas Co.*, 83 Iowa 714; 50 N. W. Rep. 283.

¹⁴⁸ *Saltsburg Gas Co. v. Saltsburg*, 138 Pa. St. 250; 20 Atl. Rep. 844; 10 L. R. A. 193.

¹⁴⁹ *New Orleans Gaslight Co. v. Paulding*, 12 Rob. (La.) 378.

supply does not fail, will authorize the company to cut off the supply when that contingency happens; and it cannot be enjoined from doing so.¹⁵⁰ An agreement that if the gas rent be not paid, the company may shut off the supply and take possession of the machinery of the mill furnished and the fixtures until payment is made gives the company no lien on the land, but only a chattel mortgage on the machinery and fixtures.¹⁵¹ A statute giving a municipality a lien on the premises does not prevent it passing an ordinance providing that the gas may be cut off if past bills are not paid.¹⁵² And it may be remarked in this connection that a municipality has the same power to enforce payment of arrearages as a private gas company has.¹⁵³ But the city cannot cut off a consumer's water supply for a failure to comply with the ordinance of the board of health respecting plumbing, in the absence of any regulation authorizing such action.¹⁵⁴ The consumer cannot prevent the company cutting off the gas on the ground that he is solvent and able to pay the bills;¹⁵⁵ although insolvency is an additional justification in the company cutting off the gas supply.¹⁵⁷ A landlord cannot prevent the company shutting off the gas from his tenant who is in arrears, or who has disobeyed the rules of the company with respect to waste; for the injury is to the tenant; and he being in default, he could not treat the action of the company

¹⁵⁰ *Thompson Glass Co. v. Fayette Fuel Co.*, 137 Pa. St. 317; 21 Atl. Rep. 93; *Black Lick v. Saltsburg*, 139 Pa. St. 448; 21 Atl. Rep. 432.

If gas be illegally cut off, the company cannot make a charge for turning it on again. Nor, as has been held, if properly cut off. *American W. W. Co. v. State*, 46 Neb. 194; 64 N. W. Rep. 711.

A trustee in bankruptcy is not liable for arrears of gas bills, where he continues to occupy the premises. *In re Flack* [1900]. 2 Q. B. 32.

¹⁵¹ *St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465; 33 N. E. Rep. 113.

¹⁵² *Altoona v. Shellenberger*, 6 Pa. Dist. Rep. 544.

¹⁵³ *Tacoma Hotel Co. v. Tacoma Light and Water Co.*, 3 Wash. St. 316; 28 Pac. Rep. 516; *Bellaire Goblet Co. v. Findlay*, 3 Ohio C. D. 205; 5 Ohio Cir. Ct. 418; *Penn. Iron Co. v. Lancaster*, 17 Lanc. L. Rev. 161.

¹⁵⁴ *Johnson v. Belmar*, 58 N. J. Eq. 354; 44 Atl. Rep. 166.

¹⁵⁵ *Bellaire Goblet Co. v. Findlay*, 3 Ohio C. D. 205; 5 Ohio Cir. Ct. 418.

¹⁵⁷ *People v. Manhattan Gaslight Co.*, 45 Barb. 136.

as an eviction or as a reason for vacating the premises.¹⁵⁸ Where the plaintiff removed from the building the day the agent of the gas company took the statement of his meter, but he did not notify the company of his removal, and five days thereafter his wife notified persons taking the meter statement to cut off the gas and take out the meter, and the wife testified that no gas was burned after this notice was given, it was held that the question whether the company was justified in refusing the plaintiff a supply of gas at his newly acquired residence because of his indebtedness for gas furnished between the time the employe took out the meter and the time the plaintiff notified the company of his removal was a question for the jury.¹⁶⁰ An agreement between the company and a consumer, separate and distinct from the contract for a water supply, providing that the rent shall be paid in advance, the company's recovery by suit of an installment for a particular period will not prevent it from subsequently cutting off the supply of water, during such period, for non-payment of the rent, the judgment being unsatisfied.¹⁶¹ The conclusion of the gas company that a consumer is in arrears does not establish its right to cut off the gas for owners; but the fact of arrears is a question of fact, to be determined from the evidence.¹⁶²

¹⁵⁸ *Brass v. Rathbone*, 153 N. Y. 435; 47 N. E. Rep. 905, affirming 40 N. Y. Supp. 466; 8 App. Div. 78. In this case it was also held that the company had not lost its right to cut off the supply because other consumers had violated the statute in the same particular.

Where the rules of the company required the owner or his agent to make the application in his own handwriting, and if made by the tenant it must be made with the written consent of such owner or agent, and the owner made the proper application, and after he had received water awhile, he transferred the premises to his wife, of which the company had no knowledge;

and the bills thereafter falling due, no demand being made on the wife but on the husband, who failed to pay, it was held that the wife could not enjoin the company from turning off the water. *Smith v. Scranton Gas and Water Co.*, 5 Lack. Leg. N. 235.

¹⁶⁰ *Bennett v. Westchester Gaslight Co.*, 40 App. Div. 169; 57 N. Y. Supp. 847.

¹⁶¹ *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447; 31 So. Rep. 31. See *Montreal Gas Co. v. Cadieux, etc.*, 11 Can. Q. B. 93.

¹⁶² *Morey v. Metropolitan Gaslight Co.*, 6 Jones & S. (N. Y.) 185. A water company may shut off the supply of a city in arrears, even

§548. Injunction to prevent cutting off gas supply.— Rates.

An injunction lies to prevent a gas company cutting off the supply of gas on the ground that a consumer will not pay an illegal rate, or a disputed bill.¹⁶³ Where a gas company entered into an agreement to supply natural gas so long as the gas was obtainable, it was held that an injunction lay to prevent its being cut off, where the result would be that the plaintiff would not be able to run its electric light company and keep its contracts to supply light with its customers.¹⁶⁴ And where, under a similar contract, the gas had been cut off, a preliminary mandatory injunction to restore it was granted.¹⁶⁵ Under such a contract, if the supply fail, the company may discontinue its efforts to furnish a supply.¹⁶⁶ A preliminary injunction restricting the shutting off of gas contracted to be furnished will be permitted to stand until final hearing, where no material injury can arise from preserving the *status quo*.¹⁶⁷ And although the right to gas rests upon a special contract between the consumer and the company, yet an injunction will be granted to compel the company to continue the supply of gas pursuant to such contract's terms,¹⁶⁸ especially where the

though it leave such city without fire protection; and an injunction will not lie to prevent it. Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161.

¹⁶³ Cromwell v. Stephens, 2 Daly 15; Bienville Water Supply Co. v. Mobile, 112 Ala. 260; 20 So. Rep. 742; 33 L. R. A. 59; Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161; Levy v. Water Works Co., 38 La. Ann. 25; State v. Levy, 36 La. Ann. 941; Wilkes-Barre Gas Co. v. Turner, 7 Kulp 399; Sickles v. Manhattan Gaslight Co., 64 How Pr. 33; 66 How Pr. 304, 314; Graves v. Key City Gas Co., 83 Iowa 714; 50 N. W. Rep. 283; Sewickley v. Ohio Valley Gas Co., 154 Pa. St. 539; 25 Atl. Rep. 808;

Smith v. London Gas Co., 7 Grant (U. C.) 112.

¹⁶⁴ Xenia Real Estate Co. v. Macy, 147 Ind. 568; 47 N. E. Rep. 147.

¹⁶⁵ Whitman v. Fayette Fuel Gas Co., 139 Pa. St. 492; 20 Atl. Rep. 1062.

¹⁶⁶ Blacklick v. Saltsburg, 139 Pa. St. 448; 21 Atl. Rep. 432.

¹⁶⁷ Corbet v. Oil City Fuel Supply Co., 5 Pa. Super. Ct. 19; 40 W. N. C. 480. See Des Moines W. W. Co. v. Des Moines, 95 Iowa 348; 64 N. W. Rep. 269; United States, etc., Co. v. Metropolitan Club, 6 App. D. C. 536.

¹⁶⁸ Corbet v. Oil City Fuel Co., *supra*; Graves v. Key City Gas Co., 83 Iowa 714; 50 N. W. Rep. 283; 93 Iowa 470; 61 N. W. Rep. 937.

consumer would suffer great damages, or not be able to carry out his contracts with his customers.¹⁶⁹

§549. Consumer's right to discontinue use of gas.

The general rule is that a customer within a municipality is required to pay for only as much gas as he consumes or as passes through his meter; and that he may discontinue the supply at any time.¹⁷⁰ Usually ordinances or statutes extend to such consumer the right to discontinue the gas at any time, even though he has paid for it in advance. But such ordinances or statutes, as an almost universal rule, do not prohibit a consumer entering into a contract with a company for a supply of gas for a specified period of time, and to bind himself to take the gas for that period of time and pay for it.¹⁷¹ This is particularly true of municipalities which usually do and are allowed to make special contracts, varying in price from that of the private consumer. Where such contracts are entered into they cannot be rescinded, if they are otherwise valid. But, of course, a contract to pay more than the ordinance or statute rate would not be valid, unless the consumer was one the company was under no legal obligation to furnish gas. If a company does not keep its special contract by failing to furnish a supply of gas, the consumer may at once serve notice upon it that he will no longer take the gas, and he will not therefore be bound to pay for gas, even though it be tendered and the contract provides that it should continue until either party should give the other thirty or other days' notice of their desire for a discontinuance.¹⁷² Such a contract cannot be construed as running from

¹⁶⁹ *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; 47 N. E. Rep. 147.

Where a larger mansion was divided into separate apartments, and the mansion was supplied through a large meter, and each apartment supplied with a small subsidiary meter, placed and maintained by the landlord, an injunction was granted to prevent him cutting off

one of the apartments. *Hersey v. White*, 9 T. L. R. 335.

¹⁷⁰ *Nebraska City v. Nebraska City, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

¹⁷¹ *Imperial Gas Co. v. Chauntler*, 2 Gas J. 362.

¹⁷² *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447; 31 So. Rep. 31.

year to year, after the first year, or as committing the company to supply gas during the whole of a subsequent year merely by failing to act on the consumer's default at the commencement of that year.¹⁷³ If a customer under a special contract refuses to take the gas provided for in the contract, the company may recover damages for breach of the contract, but it can recover only where the agreement is to take gas for a definite time, and then only such damages as it has sustained, and not the full contract price.¹⁷⁴ A failure to use gas while waiting for a tenant, will not entitle the company to discontinue it and recover liquidated damages under a clause in the contract that if the consumer discontinues the gas because the consumer is in arrears or fails to comply with the rules of the company, or is through the "fault" of the consumer prevented from supplying the gas according to the provisions of the contract, a specified amount shall "forthwith become due and payable" to the company as stipulated damages.¹⁷⁵ Where the agreement was that the consumer should declare an average minimum daily of the amount of gas which it would take annually, and would pay for it, though it took less, and that all gas it used in any month should be paid for monthly, it was held that the agreement required payment only at the end of the year for the part of the minimum amount not taken.¹⁷⁶ An agreement provided that a certain company should sink a gas well and supply certain persons with gas and all others who might desire it, and that it was to become binding as soon as twenty persons agreed to become consumers of gas; it was held that the contract became binding as soon as twenty prospective consumers had signed it, and that no one of the subscribers could withdraw his name from the agreement without the consent of all the twenty subscribers and of the person who was to furnish the gas.¹⁷⁷ Where the owner of a well

¹⁷³ Hieronymus v. Bienville Water Supply Co., *supra*.

¹⁷⁴ Queen City, etc., Co. v. Gibson House Co., 4 Ohio N. P. 119; 6 Ohio Dec. 148.

¹⁷⁵ United Electric Light, etc., Co.

v. Breneman, 46 N. Y. Supp. 916; 21 N. Y. Misc. 41.

¹⁷⁶ Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. St. 443; 40 Atl. Rep. 1000.

¹⁷⁷ Current v. Fulton, 10 Ind. App. 617; 38 N. E. Rep. 419.

that was being drilled agreed with a gas company to pay for gas it should furnish a well-driller to run his drilling apparatus, and such owner had a contract with the well-driller to furnish him all the gas necessary to run such drilling apparatus, and such well-driller knew the gas was coming through pipes from the gas company; it was held that he was liable to pay for the gas he consumed, although he had never agreed to pay for it.¹⁷⁸ The consumer cannot cut off the supply of gas at the stop cock located in the street or sidewalk until after reasonable notice given to the company to shut it off, followed by neglect to do so; and if a rival company undertake to cut it off, even though the consumer may desire to make a change to it, an injunction will be granted to prevent it interfering with the stop cocks and service pipes, until after reasonable notice to the old company be given, and a failure on its part to cut off the connection.¹⁷⁹ A consumer who desires to discontinue the use of gas and escape liability for it, where it is furnished by the month or year, or the like, should notify the gas company, in order that they may shut off his supply,¹⁸⁰ but, of course, if he pays only for the amount registered by the meter, there is little reason to give such a notice, unless he desires it cut off from his premises. And if he is bound to take the gas, whether he use it or not, the gas company is not entitled to an injunction to compel him to use it, its action at law for damages giving sufficient compensation.¹⁸¹

§550. Ownership of supply pipe.

When a supply pipe — a pipe running from the company's gas mains in the street to the meter in the house — is put down by the gas company, as often happens, it belongs to the owner of the real estate, and the company may not remove it upon the con-

¹⁷⁸ Chamberlain v. Summit Gas Co., 3 Penn. (Pa.) 261.

¹⁷⁹ Pennsylvania Gas Co. v. Warren, etc., Co., 3 Pa. Dist. Rep. 67.

¹⁸⁰ Pennsylvania Gas Co. v. Warner, etc., Co., 3 Pa. Dist. Rep. 67.

¹⁸¹ Steinau v. Cincinnati Gaslight and Coke Co., 48 Ohio St. 324; 27

N. E. Rep. 545; reversing 2 Ohio Cir. Ct. Rep. 286.

If a consumer owns two sets or lines of pipes and two meters, he may discontinue one and use the other. He may discontinue the use of illuminating gas entirely, and use fuel gas. State v. New Orleans, etc., Co. (La.), 32 So. Rep. 179.

sumer or owner of the premises ceasing to be a customer; and this was held true even when the company had a steady rule in force when it put down the pipe that "the connecting pipes and works from the street mains to the consumer's premises shall at all times be under the control and management of the corporation, and shall be deemed to belong to them."¹⁸² This was the case of a water company which put down a lead supply pipe, which poisoned the water; and it was held that inasmuch as the supply pipe belonged to the customer the company was not liable.¹⁸³

¹⁸² *Milnes v. Hundersfield*, 11 App. Cas. 511; 56 L. J. Q. B. 1; 55 L. T. 617; 34 W. R. 761; 50 J. P. 676; affirming L. R. 12 Q. B. Div. 443; which affirmed L. R. 10 Q. B. Div. 124.

¹⁸³ A rule of the gas company reserving to it the right to make all

taps of or connections with its mains is a reasonable one. *Pocastello Water Co. v. Standley* (Idaho), 61 Pac. Rep. 518.

Only the company owning the supply pipe can use it. *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 20 Hun 214.

CHAPTER XXVI.

METERS AND MIXERS.

- §551. Definitions.
- §552. Who must furnish.
- §553. Control of meter.
- §554. Unreasonable requirements.
- §555. Inspection of meters by company.
- §556. Official inspection and tests.
- §557. Officially tested meters conclusive.
- §558. Measurements of quantity of gas used.
- §559. Delivery of gas.
- §560. Rules and regulations concerning.
- §561. Extra charges for meters and mixers.—Government tax.
- §562. Requiring use of a certain quantity of gas per month or pay a meter rent.
- §563. Discrimination in use of meter.
- §564. Removal of meters.

§551. Definitions.

A meter (often spelled metre) may be defined as an instrument, apparatus or machine for measuring fluids, gases, air electrical currents, etc., and recording the results obtained. A dry meter is a gas meter not containing fluid as an essential part of it.¹ A water meter is one in which water is kept through which the gas passes. A gas mixer is a cylindrical instrument by which air is mixed with natural gas as it enters the burner, thereby securing greater combustion and producing a higher degree of heat with the same quantity of gas.

§552. Who must furnish.

It is almost the universal practice of gas companies to furnish gas meters whenever they are used; but this is a matter subject to local usage. Frequently statutes or ordinances require them,

¹ Standard Dictionary, "Meter."

to do so, free of charge. Probably the rule with respect to gas mixers is not so general as that with respect to gas meters, and patrons frequently furnish their own. Where an ordinance or statute requires them to furnish meters, a company cannot make an extra charge for them; and this occurs where a company is compelled to furnish gas at so much a thousand feet, nothing being said about who shall furnish the meter, it being considered the duty of the company to furnish and attach it to the pipes in a proper manner, in order to ascertain the amount of gas furnished.² But the company is not required to furnish more than one meter for a house—not one for each floor—unless the house is occupied by different tenants who have independent service pipes. When that is the case, each apartment is regarded as an independent house.³ And if the company have the right to require a consumer to furnish a meter before it will supply him with gas, it has no right to insist that he shall furnish a meter when it does not make that requirement of others; for all must be treated alike. Nor has it the right to require a customer to furnish expensive meters when a meter costing less will correctly measure the gas.⁴

² *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; *Albert v. Davis*, 49 Neb. 579; 68 N. W. Rep. 945; *Capital, etc., Co. v. Gaines*, 20 Ky. L. Rep. 1464; 49 S. W. Rep. 462; *Sheffield W. W. Co. v. Carter*, L. R. 8 Q. B. 632. *Contra*, *Sheffield W. W. Co. v. Bingham*, L. R. 25 Ch. Div. 443; 48 L. T. 604; 52 L. J. Ch. 624. See *State v. Sedalia Gas Co.*, 34 Mo. App. 501; and *Ladd v. Boston*, 170 Mass. 332; 49 N. E. Rep. 627; 40 L. R. A. 171.

³ *Ferguson v. Metropolitan Gas Co.*, 37 How. Pr. 189; *Young v. Boston*, 104 Mass. 95.

The meters in use are a part of the plant for the purposes of taxation. *Com. v. Lowell Gaslight Co.*, 12 Allen 75.

⁴ *State v. Jersey City*, 45 N. J. L. 246; 2 Am. and Eng. Corp. Cas. 233. It is not unreasonable to require the company to furnish a meter. *Spring Valley W. W. v. San Francisco*, 82 Cal. 286; 22 Pac. Rep. 910, 1046; 6 L. R. A. 756; 16 Am. St. Rep. 116. Such a statute is constitutional. *Buffalo v. Buffalo Gas Co.*, 80 N. Y. Supp. 1093; citing *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125. and *State v. Columbus, etc., Co.*, 34 Ohio St. 579; 32 Am. Rep. 390, and also *People v. Budd*, 117 N. Y. 1; 22 N. E. Rep. 682; 5 L. R. A. 559; 15 Am. St. Rep. 460; *Spring Valley W. W. Co.*, 110 U. S. 353; 4 Sup. Ct. Rep. 48; *Cotling v. Kansas City, etc., Co.*, 183 U. S. 85; 22 Sup. Ct. Rep. 30; *Munn v. Illinois*, 94 U. S.

§553. Control of meter.

The gas company, where it owns the meter, has the absolute control of it and the lead pipes used to make connections with it, subject to the use of it by the patron. If the patron owns it, the company cannot remove it if he cease using gas, but it can if it owns the meter. Their remedy is to cut the gas off where it does not own the meter, before it enters on the patron's premises, in case of non-user. Where the company own it and place it in position, attached to the pipes, this is not a bailment of it. In such an instance the patron or consumer has no right to interfere with it without notice to the company, unless in a case of emergency to prevent damages. Nor has he any right to place a governor upon it to regulate the pressure of the gas, or

113, as directly in point in principle.

The English cases seem to hold that although a water company is not bound to furnish a meter, yet the consumer is also not bound to furnish one; for he may prove the amount of water he receives independent of meter measurement. "I do not intend to decide that a meter is necessary. . . . I am not going to decide that any particular meter must be used. . . . All I am going to decide is that Mr. Brigham must at his own expense measure the water and record that measurement, and that he must give, of course, all facilities to the company to ascertain that he has measured the water, and that he has measured it in some way or other which is an accurate way of taking the measurement." *Sheffield W. W. Co. v. Bingham*, 25 Ch. Div. 443. and 446 (36 Gas J. 769); *Sheffield W. W. Co. v. Carter*, 8 L. R. Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P. 548. See also *Levy v. Water Works Co.*, 38 La. Ann.

29; *Ernest v. New Orleans W. W. Co.*, 39 La. Ann. 550.

A city charter authorized its council to legislate for the protection of the city water works and the use of water taken from them, and also as to the means of ascertaining the amounts to be paid as water rates, and the water system was such that the consumer, at his own expense, made connections with the mains. It was held proper for the council to adopt an ordinance requiring the consumers, at their own expense, to provide meters for measuring the water they took, and that the ordinance might provide that only those using supply pipes over a certain diameter should be compelled to use meters. *State v. Goswell (Wis.)*, 93 N. W. Rep. 542; citing *Sheffield W. W. Co. v. Bingham*, *supra*; *Red Star S. S. Co. v. Jersey City*, 45 N. J. L. 246; *Spring Valley W. W. v. San Francisco*, *supra*; *Sheffield W. W. Co. v. Carter*, L. R. 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. B. 548.

upon the supply pipe leading to the meter, if it belong to the company; and if he do, or any one else, the act is such a trespass as may be enjoined and the removal of the governor be compelled. In such an instance the court will readily interfere by an injunction; for as gas is a dangerous article, which if it escape may produce great injury or damages, the necessity for issuing an injunction is much more urgent and necessary than in an ordinary trespass. Even the defense of laches will not prevail in such an instance. And if a third person has placed the governor on the meter, he may be enjoined and compelled to remove it; and in such an instance it is not necessary to make the owner of the premises a party. In such an instance the owner cannot object to its removal. But the owner of the premises has a right to put a governor on his pipes after the gas has passed through the meter; or to attach it to the end of his pipe nearest the company's meter; and perhaps so much of the supply pipe as he owns and which is on his premises; and even here the company have a right to adopt reasonable regulations.⁵ A consumer, however, is not relieved from all care of a meter entrusted to his care; for he is required to take proper care of it; and if he permit it to get out of repair through his neglect of duty he owes toward it, he may be bound by the result of its measurements, in case there is a substantial dispute over the amount furnished.⁶

⁵ *Blondell v. Consolidated Gas Co.*, 89 Md. 732; 43 Atl. Rep. 817; 46 L. R. A. 187. The secretary's consent to attach the meter is not the company's. *De Mattos v. Gibson*, 4 De G. & J. 276. See *Baen Avon Coal Co. v. McCulloh*, 59 Md. 403; 43 Am. Rep. 560.

A rule that the governor shall be connected with the pipe one foot from the meter is a reasonable one. *Foster v. Philadelphia Gas Works Trustees*, 12 Phila. 511.

⁶ *Preston v. Hayton, etc., Gas Co.*, 25 Gas J. 889; *Victoria Docks Gas Co. v. Burton*, 16 Gas J. 103.

If an explosion is occasioned because a sufficient quantity of water

is not kept in the meter, the company will be liable for the damages occasioned. *Ellis v. London Gaslight Co.*, 32 Gas J. 849.

That the owner of the premises, whether he or his tenant uses gas, has no right to interfere with a meter or mixer without notice to the company, see *Pennsylvania Gas Co. v. Warren Gas Co.*, 3 Pa. Dist. Rep. 67.

Where a city infringed a patent by using disks in its water meters, it was required to remove them, although it took time and trouble to locate and do so. *National Meter Co. v. Poughkeepsie*, 75 Fed. Rep. 405.

§554. Unreasonable requirements.

An ordinance required a gas company to furnish natural gas by meters or through mixers, at the option of the consumer; but it was held void for unreasonableness, for the reason that the company may be able to use other appliances, at less cost to it, and without injury to the company.⁷

§555. Inspection of meters by company.

The company has the right to enter on the premises at reasonable times, upon notice first given of its intention, to inspect the meter, and especially to ascertain the amount of gas used.⁸ In this respect, however, there are mutual rights and obligations that must be observed. The company has no right to visit the premises at unseemly hours — perhaps not out of business hours — except in a case of emergency; nor to visit them more than actually necessary, nor to remain on the premises for a longer period than is necessary to make the inspection or necessary repairs. Nor can the owner or consumer deny them the right to make all necessary inspection; for if he do, the gas company would be justified in removing the meter and refusing to supply him with gas, or cutting off his supply; or it might bring an action to compel him to allow an inspection. But where it appeared that the defendant, in an action to compel him to permit the gas company to inspect a gas meter, was the lessee of the grounds and cellar floor of the building, the upper floor of which was occupied by other tenants; that the gas meter for this upper floor was in the cellar, having been placed there by the owner of the premises before the defendant took his lease, in which no mention was made of the meter; and it did not appear it would be impracticable to place the meter on the upper floor, it was held that the company must fail in its action.⁹

⁷ Toledo v. N. W. Natural Gas Co., 5 Ohio Cir. Ct. 557; 3 Ohio Cir. Dec. 273. See Indiana, etc. Gas Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

⁸ Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479.

⁹ Wilkes-Barre Gas Co. v. Turner, 7 Kulp 399.

§556. Official inspection and tests.

In many instances statutes or ordinances require official inspection and tests, or inspections and tests by state or municipal authority. Usually these statutes or ordinances provide for sealing the meter, if found correct, and that a certificate of approval be furnished. In such an instance mandamus lies to compel the state or municipal official to make an inspection and test of a meter placed in proper position.¹⁰ A statute providing that the gas companies of the State should pay the salary of a State gas inspector was held valid, it not being a tax for the purpose of general revenue within the meaning of a provision of the constitution requiring that taxes should be assessed upon property by a uniform rule, but a charge for a special purpose growing out of the supervisory power of the State over their business, and was not a tax on property.¹¹

§557. Officially tested meters conclusive.

In New Brunswick a meter examined, tested and stamped by a government official is conclusive in its measurements when a contest arises over the amount of gas furnished; but the gas company has the burden to show that it was examined, tested and stamped as correct and accurate in its measurements.¹² But in New York the consumer may show by reliable testimony that he did not receive the amount of gas registered by an officially inspected meter.¹³ For instance, he may show that the gaslight went out by air passing through the tubes, as affecting the quantity of gas consumed.¹⁴ And where the consumer had entered into a contract to take the meter measurement as the measure of the quantity of gas furnished; it was held that the consumer would not be bound by the registration of the meter if it had not been examined and certified to by the official in-

¹⁰ *In re McDonald*, 16 Misc. (N. Y.) 304; 39 N. Y. Supp. 367.

¹¹ *Cincinnati Gaslight and Coke Co. v. State*, 18 Ohio St. 237.

¹² *St. John Gas Co. v. Clarke*, 17 N. B. 307.

¹³ *Sickles v. Manhattan Gaslight Co.*, 66 How. Pr. 314; *Tarrytown, etc. Gaslight Co. v. Bird*, 65 Hun 621; 19 N. Y. Supp. 988.

¹⁴ *Tarrytown, etc., Gaslight Co. v. Bird*, *supra*.

spector.¹⁵ Where there is a dispute over the accuracy of the meter's measurements, an injunction lies to prevent the company cutting off the gas until the accuracy of the charge can be determined by a suit at law.¹⁶

§558. Measurements of quantity of gas used.

The correct measurement of gas is a subject of importance both to the gas company and consumer. Usually, if not universally, in the case of artificial gas, the amount consumed is determined by a meter. And it may be laid down as a general rule that the amount registered by a meter is presumed to have been supplied and to be a correct measurement, unless there be evidence to cast a doubt upon its correctness. Thus where the question was whether the meters had registered correctly, in an action to recover back money paid for gas in excess of what was due, and the evidence showed that they registered correctly at a level, but registered in favor of the company at a high-water level, and in favor of the consumer at a low-water level; and that since dry meters had been put in, the bills diminished, it was held that taking into account the fact that the consumers must take proper care of their meters, and the conflict of the evidence, the decision must be for the defendant—the gas company.¹⁷ So where the action was to recover for gas converted by the consumer to his own use, and it appeared that in some way the meter became tilted, and the gas passed through without registry, and the action was to recover the price of the gas it was estimated had passed through the meter without registry, and the consumer contended he had used only the amount registered; and for this he had paid; yet the jury found for the plaintiffs.¹⁸ While it is true the meter measurement is *prima facie* correct, yet the consumer may show it is incorrect; and that too, even though a statute provides that such measurement

¹⁵ Manhattan Gas Co. v. Flamme, 12 N. Y. Weekly Dig. 245.

¹⁶ Sickles v. Manhattan Gaslight Co., *supra*.

¹⁷ Preston v. Hayton, etc., Gas

Co., 25 Gas J. 889.

¹⁸ Victoria Docks Gas Co. v. Burton, 16 Gas J. 103. See also Hacker v. London Gaslight Co., 32 Gas

J. 781.

shall be taken as *prima facie* evidence of its correctness.¹⁹ Where the action was to recover for gas alleged to have been furnished and not registered because of its having been tampered with, and it appeared that the defendant had increased the number of his burners at a certain date, although the gas thereafter sensibly diminished; and six years thereafter the meter was tested by the gas inspector and found to be correct, but afterwards it was discovered that the water in the meter was kept too low, a simple fact easily discovered; and a part of the meter machinery was so arranged that it did not register; it was held that the plaintiff could recover for no gas used before the date of the inspection.²⁰ In the case of a wet meter, it seems to be the duty of the gas company to keep it properly supplied with water.²¹

§559. Delivery of gas.

When gas has passed through the meter it is delivered to the consumer; and the title to it then vests in him. So that if after that period of time a third person obtains the use of it, the gas company is not liable for the consumer's loss, and he must pay for all registered by the meter.²²

§560. Rules and regulations concerning.

A gas company has full power to adopt reasonable regulations and rules concerning meters and their use. And so has a municipality furnishing gas to private consumers. An order that all regulators or governors shall be attached to the gas pipes

¹⁹ Alliance, etc., Co. v. Taaffe, 27 Gas J. 206.

²⁰ Imperial Gas Co. v. Porter, 5 Gas J. 372, 403.

²¹ Hacker v. London Gaslight Co., 32 Gas J. 781.

Where a statute forbade any one to lay any pipe to communicate with the company's pipe without its consent, under a penalty, and a consumer being dissatisfied with the company's meter, put up a sec-

ond meter of his own, he was fined. *In re* Gaslight and Coke Co., 57 Gas J. 1196.

²² Chouteau v. St. Louis Gaslight Co., 47 Mo. App. 326. See Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653; Blondell v. Consolidated Gas Co., 89 Md. 732; 43 Atl. Rep. 817; 46 L. R. A. 187; Indiana, etc., Co. v. Anthony, 26 Ind. App. 307; 58 N. E. Rep. 868.

or to the meter, unless placed upon a by-pass so as the flow of gas may be directed through the pipes without passing through the governor regulator, is a just and reasonable regulation.²³

§561. Extra charges for meters and mixers.—Government tax.

A company cannot make a charge for meter rent, where its rate is fixed by a statute or an ordinance. Thus where a company by its charter was authorized to supply customers with gas, "under reasonable regulations," at a price not to exceed one dollar and thirty-five cents a thousand cubic feet, it was held it could not charge a meter rent in addition if less than a certain quantity was used. The company was bound to furnish the meter to measure the gas the court said, and could not charge for such a necessity.²⁴ But where neither a statute nor an ordinance, nor the company's charter impose any restriction upon the company concerning its charges, it may charge small customers more than large ones, and such charges are not invalid because they are called meter rents; when in fact the charges are charges up to a certain amount.²⁵ Adding the amount of the government's tax to the price is a legitimate charge.²⁶

²³ *Foster v. Philadelphia Gas Works*, 12 Phila. 511; *Blondell v. Consolidated Gas Co.*, *supra*.

Using meters in some of the supply pipes of a building by a water company to determine whether or not more than 150 gallons per day are being used in violation of a provision regulating the amount of water that may be used, does not violate a statute requiring the scale of water rates to be general and uniform. *Frothingham v. Bensen*, 20 Misc. 132; 44 N. Y. Supp. 879.

²⁴ *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; *Capital, etc., Gas Co. v. Gaines*, 20 Ky. L. Rep. 1464; 49 S. W. Rep. 462;

Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093; *State v. Columbus, etc., Co.*, 34 Ohio St. 579; 32 Am. St. Rep. 390.

²⁵ *State v. Sedalia Gas Co.*, 34 Mo. App. 501.

²⁶ *St. Louis Gaslight Co. v. St. Louis*, 11 Mo. App. 55; 84 Mo. 202.

Where the company's charter contained no reference to its right to charge a meter rent, a subsequent statute provided that "no gas company shall have the right to charge rent for meters, when 500 cubic feet per month have been consumed"; it was held that the statute was binding on the company. *State v. Columbus Gaslight and Coke Co.*, 34 Ohio St. 572; 32 Am. Rep. 390.

§562. Requiring use of a certain quantity of gas per month or pay a meter rent.

Where a gas company cannot charge a meter rent, it cannot evade the prohibitory clause by indirection. Nor can it adopt a rule that if a certain amount of gas is not consumed within a month or other period of time, the consumer shall pay a certain amount regardless of the amount consumed. To permit such a charge is in fact to allow the company to charge a meter rent, and thus cast a burden on the consumer it is bound to carry.²⁷

§563. Discrimination in use of meter.

A company cannot show discrimination between two patrons by requiring one of them to take gas by meter measurement and permit the other to take it by a "flat" rate, if the discrimination is, in some measure, unjust and oppressive. But there must be something more than mere discrimination. The discrimination prohibited must not only be an actual one, but it must be both unjust and oppressive, to some extent. Thus where an ordinance provided that a gas company might charge twenty cents per thousand cubic feet, or a certain named "flat" rate, it was held in a proceeding for a mandamus to compel it to furnish the applicant gas at the "flat" rate, as it was furnishing all its other patrons, instead of the meter rate, that the applicant was not entitled to the writ unless he showed that the meter rate was a higher rate than the "flat" rate.²⁸

²⁷ Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093.

²⁸ Indiana, etc., Gas Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

That a discrimination must be both unjust and oppressive, see Cleveland, etc., R. R. Co. v. Closser, 126 Ind. 348, 354; 26 N. E. 159, 161; 9 L. R. A. 754; 22 Am. St. Rep. 593.

An ordinance of a municipality or a rule of the company that a consumer may put in a meter at

his own expense and pay by meter measurement instead of a "flat" rate is valid; and he cannot be denied his right to exercise the option given him. State v. Joplin W. W., 52 Mo. App. 312. An ordinance is not invalid that gives a householder the option to require a meter and pay for water used at rates which are different from the fixed house rates. Spring Valley W. W. v. San Francisco, 82 Cal. 286; 22 Pac. Rep. 910, 1046. See State v. Goswell (Wis.), 93 N. W. Rep. 542.

§564. Removal of meters.

So long as a patron complies with the rules and regulations of the company, and pays his bills, the company cannot remove the meter from his premises, unless it be to replace it with another. But where a company was not required to put in service pipes, yet entered into an agreement with the owner of the premises to do so, such owner (who was the consumer) agreeing to pay the cost thereof; it was held that the company had the right to remove its meter on the owner refusing or failing to pay for the pipes.²⁹ And where a consumer resorts to other methods of light, as the introduction of electric lights, and thereafter uses gas only occasionally, he ceases to be a consumer, and the company may recover his meter.³⁰ And where a company charged meter rent, though other consumers were not charged such a rent, and the customer refused to pay it, and did not use enough gas by a sixth part to pay the meter rent, it was held that the company had the right to refuse him gas.³¹ Permitting a company to remove its meter pending a dispute as to the liability of the company to a penalty incurred by its refusal to supply the consumer, does not prevent such consumer enforcing the replacement of the meter, after the dispute is settled.³²

²⁹ *Detroit Gas Co. v. Moreton Treich, etc., Co.*, 111 Mich. 401; 69 N. W. Rep. 659. In this case it was held that replevin lay to recover the meter.

See *Glasgow v. Patrick, etc., Co.*, 22 Gas J. 54.

³⁰ *Adams Express Co. v. Cincinnati Gaslight and Coke Co.*, 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18; *Fleming v. Montgomery Light Co.*, 100 Ala. 657; 13 So. Rep. 618.

³¹ *Smith v. Capital Gas Co.*, 132 Cal. 209; 64 Pac. Rep. 258.

³² *Jones v. Rochester Gas, etc., Co.*, 7 App. Div. 474; 39 N. Y. Supp. 1110.

If the company is bound to remove the meter on notice, the consumer cannot remove it; and if he do or attempt it, the company may enjoin him. *Glasgow v. Patrick, etc., Gas Co.*, 22 Gas J. 54.

CHAPTER XXVII.

FIXTURES.

Art. 1. Domestic fixtures.

Art. 2. Trade fixtures.

Art. 3. Oil and gas lease fixtures.

§565. Division of subject.

The subject of fixtures relative to gas or oil necessarily follows the lines laid down in text books on that subject; such as whether the question is one between vendor and vendee, lessor and lessee, landlord and tenant, and mortgagor and mortgagee. Another division is whether the article in dispute is a domestic or trade fixture; or whether it is one used upon oil or gas producing territory in the production or supply of oil or gas. The fixtures used in the latter instance usually have reference to the production of petroleum or natural gas. The subject, therefore, can be divided into three general subjects.

ARTICLE 1.

DOMESTIC FIXTURES.

§565. Division of subject.

§566. Intent.— Common law.— Public policy.

§567. Agreement.— Innocent purchaser.— Injury to freehold.

§568. Gas chandeliers.— Stoves.— Meters, etc.

§569. Judicial sale of premises.

§570. Gas fixtures may pass to vendee.

§566. Intent.— Common law.— Public policy.

The question of the intent with which an article is affixed to the premises or building is one that must always be consid-

ered in determining whether or not it is a fixture. The intent must often be gathered from the kind of article in controversy, and how it is attached to the premises. If an article is so attached to the premises by the owner of them that it cannot be removed without material injury to the freehold, and there is no contract with reference to it, then it is a part of the freehold, and will pass to a purchaser of the premises or be covered by a mortgage given by the owner of the freehold. "The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold. (2) Appropriation or adoption to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold."¹

Continuing the court says: "According to the elementary rule of the common law whatever is annexed to the freehold becomes, in legal contemplation, a part of it, and is thereafter subject to the same incidents and conditions as the soil itself. But the diversity of trade and the development of manufactures require that the strict rules of the common law be measurably relaxed, and it may now be said that the nature of the article and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article, which may or may not be a fixture, becomes a part of the realty by being annexed to the freehold. The purpose or intention of the parties, the effort and mode of annexation, and the public policy in relation thereto, are all to be considered."²

¹ *Binkley v. Forkner*, 117 Ind. 176; 19 N. E. Rep. 753; citing *Teaff v. Hewitt*, 1 Ohio St. 511, 530; *Potter v. Cromwell*, 40 N. Y. 287; *McRea v. Central Nat'l Bank*, 66 N. Y. 489, quoted in *Parker Land Improvement Co. v. Reddick*, 18 Ind. App. 616; 47 N. E. Rep. 848.

² In *Shellar v. Shivers*, 171 Pa. St. 569, 33 Atl. Rep. 95, it is said:

"Mere physical annexation is no longer the rule. . . . The intention to annex, whether rightfully or wrongfully, is the legal criterion." See also *Hayford v. Wentworth* (Me.). 54 Atl. Rep. 940, where it was held that a "wash-down syphon water closet, and its appurtenances, put into a business office in the usual manner by a tenant at will

§567. Agreement.— Innocent purchaser.— Injury to freehold.

In the case already quoted from it is said concerning agreements relating to fixtures: "When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intentions of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into, and a part of, the realty by the act and manner of annexation.³ Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty notwithstanding their annexation. In such a case the mental attitude of the parties cannot modify the legal effect from the annexation.⁴ But when chattels are of such a character as to retain their identity and distinctive characteristics after annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement.⁵ Accordingly, the proposition is well

for his own use, and which could be removed without material injury to the realty, did not become merged in the realty unless it was so put in with an intention to make a permanent accession to the realty."

As to what gas fixtures are covered by a policy of insurance, see *New York Gaslight Co. v. Mechanics' Fire Ins. Co.*, 2 Hall 108.

³ Citing *Taylor v. Watkins*, 62

Ind. 511, and *Yater v. Mullen*, 24 Ind. 277.

⁴ Citing *Campbell v. Roddy*, 44 N. J. Eq. 244; 14 Atl. Rep. 279; *Henkle v. Dillon*, 15 Ore. 610; 17 Pac. Rep. 148.

⁵ Citing *Rogers v. Cox*, 96 Ind. 157; *Price v. Malott*, 85 Ind. 266; *Hendy v. Dinkershoff*, 57 Cal. 3; *Haven v. Emery*, 33 N. H. 66; *Malott v. Price*, 109 Ind. 22; 9 N. E. Rep. 718.

sustained that one who purchases machinery with a view that it shall be annexed to, or placed in, a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold.⁶ Except where the rights of innocent purchasers are involved, it is the policy of the law to uphold such contracts in the interest of trade."⁷ It was also held in this case that if the detachment of the fixtures covered by the chattel mortgage would occasion some diminution in value of the freehold, as it would have stood had the attachment not been made, then the depreciation must be made whole by the chattel mortgagee to a junior mortgagee of the freehold, and the rights of the parties adjusted by the court according to the equity of the case.⁸

§568. Gas chandeliers.— Stoves.— Meters, etc.

But while the quotations made in the preceding sections seem to lay down rules easily understood, yet trouble arises in

⁶ Citing *Eaves v. Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Campbell v. Roddy*, 44 N. J. Eq. 244; 14 Atl. Rep. 279; *Henkle v. Dillon*, 15 Ore. 610; 17 Pac. Rep. 148.

⁷ *Binkley v. Forkner*, 117 Ind. 176; 19 N. E. Rep. 753. The court cites and comments on *Pierce v. George*, 108 Mass. 78, where a subsequent mortgage of the real estate took precedence of a previous chattel mortgage of machinery attached to the building; and also cites *Hunt v. Bay State Iron Co.*, 97 Mass. 279. See *United States v. New Orleans R. R.*, 12 Wall. 362, and *Fosdick v. Schall*, 99 U. S. 235. "The distinction," said the court in *Binkley v. Forkner*, *supra*, "between chattels whose completeness and identity as separate and distinct articles may be preserved notwith-

standing their annexation, and those which necessarily become absorbed or merged in the realty by being annexed must be kept in view."

⁸ *Binkley v. Forkner*, 117 Ind. 176; 19 N. E. Rep. 753.

Electric lighting fixtures used in and about a theatre that can be detached without injury to the building, such as switchboard to connect a dynamo to the permanent wiring of such building, chandeliers and electric signs, are chattels and not part of the realty in *New York. New York Life Ins. Co. v. Allison*, 107 Fed. Rep. 179; 46 C. C. A. 229. The retention of the title to a portable furnace by the vendor gives him an implied right to retake it if not paid for, even after it is set up; so that it is not included in a prior mortgage on the realty. *Duffus v. Howard Furnace Co.*, 8 N. Y. App. Div. 567; 40 N. Y. Supp. 925.

their application. Thus, it has been held that gas chandeliers in a house, attached by screws to pipes conveying the gas are not part of the realty. "Gas fixtures," said the court, "whether in the form of chandeliers suspended from the ceiling at the top of the room, or projecting as brackets from the perpendicular walls, though attached to pipes by screws and made tight by cement, are in the nature of furniture, and do not lose their character as chattels by reason of the manner in which they are affixed."⁹ Accordingly, therefore, to the greater number of authorities, gas fixtures, chandeliers, gaseliers, candelabra, sconces, and other instruments used as substitutes for oil lamps and candles in lighting a house, and gas stoves, will not pass to the vendee of the realty as a part of it. They are regarded as personal property, and do not pass by the ordinary deed of conveyance.¹⁰

⁹ *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353. So it was held, because of the character of the article, that an action of tort would not lie for their conversion. *Guthrie v. Jones*, 108 Mass. 191.

¹⁰ *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299; *Shaw v. Lenke*, 1 Daly 487. In this last case it is said that, "the adjustment of the bracket or chandelier to the gas pipe is not such an actual annexation to the freehold as is contemplated by law." *Kirchman v. Lapp*, 19 N. Y. Supp. 831; *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622; *Jarechi v. Philharmonic Society*, 79 Pa. St. 403; 21 Am. Rep. 78; *Penn. Mut. Life Ins. Co. v. Thackara* (Pa.), 10 Wkly. W. N. C. 104; 11 Wkly. W. N. C. 391; 13 Reporter 731; *McLean v. Palmer*, 2 Kulp (Pa.) 349 (oil lamps); *Wilson v. Freeman*, 7 Wkly. W. N. C. (Pa.) 33 (chandeliers in a saloon); *Voorhis v. Freeman*, 2 Watts. and S. 116; 37 Am. Dec. 490; *Heysham v. Dettre*, 89 Pa. St. 506 (heaters).

In England a statute authorized a gas company to let for hire to

the user of gas "any fittings for the gas," and declared that such "fittings" should not be the subject of distress when let to his tenant. This statute was held to cover a gas stove, used for heating purposes only, and rented to a tenant. *Gaslight and Coke Co. v. Hardy*, 17 Q. B. Div. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 36 W. R. 50; 51 J. P. 6. And the same rule was adopted where a stove was used for cooking, "containing besides the burners and the chamber in which the gas was consumed, other chambers together with grates, hot plates and arrangements for the reception of cooking utensils." *Gaslight and Coke Co. v. Herbert Smith*, 3 Times Law Rep. 15. *Gaslight and Coke Co. v. Hardy*, 56 L. J. Q. B. 168.

Meters put upon premises by a gas company, and attached to the gas pipes by solder, and by means of those pipes to the company's main, belong to the company. *Regina v. Inhabitants of Lee*, L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S.) 704; 14 W. R. 311. City removing

Gas chandeliers so far partake of the nature of personal property, that a thief who severs and immediately carries them away may be convicted of larceny.¹¹

§569. Judicial sale of premises.

The rule as between vendor and vendee is applicable to an instance where the premises are sold under judicial or other like process; and the right of the former owner and purchaser at such sale are determined exactly the same as if the former owner had himself sold the premises to the purchaser under the enforced sale.¹² And this is true even though the sale is one conducted under the provisions of a mortgage.¹³

§570. Gas fixtures may pass to vendee.

As intimated in a previous section, the ordinary gas fixtures may pass to the vendee. In a New York case it is said that they may pass as a part of the realty, if the intent that they shall so pass is shown by acts and declarations of the vendor.¹⁴ But some of the cases go farther than this. Thus in England it was said: "The gaseliers (chandeliers) are a part of the gas pipes, and, to use a legal expression, they take their nature and are

water meter after building had been prepared for its use. *Ladd v. Boston*, 170 Mass. 332; 49 N. E. Rep. 627; 40 L. R. A. 171. Gas purifiers, gas holders, pumps and exhausters are taxed or rated as fixtures in England. *Regina v. Lee*, *supra*.

¹¹ *Smith v. Commonwealth*, 14 Bush. (Ky.) 31; 29 Am. Rep. 402.

For instance, where gas fixtures are held to be realty, see *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. and Ayr. 61; 4 Dea. and Chit. 143; 4 L. J. (N. S.) Bank. 24; and *Central Trust, etc., Co. v. Cincinnati, etc., Co.*, 26 Wkly. Law Bull. 149; 11 Ohio Dec. Rep. 348.

In Scotland gas fixtures are per-

sonal property. *Nisbet v. Mitchell-Innes*, 7 R. 575.

¹² *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622; *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353; *McNally v. Connolly*, 70 Cal. 3; 11 Pac. Rep. 320.

¹³ *Montague v. Dent*, 10 Rich. 135; 67 Am. Dec. 572.

In Pennsylvania shares of stock in an oil company, an oil lease and an interest in the fixtures thereon cannot be attached, under Act of July 12, 1842, for wages. *Dawson v. Kirby*, 6 Pa. Dist. Rep. 13; 27 Pitts. L. J. (N. S.) 234.

¹⁴ *Funk v. Brigaldi*, 4 Daly 359; *Central Trust, etc., Co. v. Cincinnati, etc., Co.*, 26 Wkly. Law Bull. 149; 10 Ohio Dec. Rep. 348.

included in the fixtures which go with the house under the lease. They are as much a part of the gas pipes as the mill stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes, which are of no practical use when separated from them."¹⁵ And in America are cases holding gas fixtures to be a part of the realty. Thus in New Jersey it was said: "Gas burners are fixtures. They are in no sense furniture, but are mere accessories to the mill. The apparatus for the manufacture of gas (called a generator) is situated in a pit made expressly for it in a small building built for it a short distance from the main building. It is connected with a gas pump in the building, and the pipes are attached to the beams and girders by hooks, and in some places pass through the holes in the side walls, bored for the purpose. The generator and its appurtenances, and the pipes are fixtures."¹⁶ What is said about "gas burners" may be regarded as a *dictum*; but it is evident that the court would have held them to be a part of the realty if there had been a controversy over them. In Kentucky it is held that chandeliers, affixed by means of screws to iron pipes let into the walls of the house, in order to conduct gas to the burners, even though they could be moved without injury to the walls or ceilings, and which formed an ornamental addition to the house, belong to the vendee as between him and the vendor, being a part of the real estate.¹⁷ And in New York it was held that gas logs may be fixtures if the intention of the owner was to make them such; and that the intention was to be determined from such owner's acts and conduct, and from all the circumstances of the transaction.¹⁸ So in the same State it

¹⁵ Sewell v. Angerstein, 18 L. T. (N. S.) 300. See also Hutchinson v. Kay, 23 Beav. 413.

¹⁶ Keeler v. Keeler, 31 N. J. Eq. 191, 191. In Hays v. Doane, 11 N. J. Eq. 84, it is held that a gasometer and apparatus for generating gas, are movable property, and not fixtures, as between landlord and tenant.

¹⁷ Johnson v. Wiseman, 4 Met. (Ky.) 357; 83 Am. Dec. 475.

¹⁸ Cosgrove v. Troescher, 62 App. Div. (N. Y.) 123; 70 N. Y. Supp. 764. Same rule applied to gas fixtures. Daniels v. Detwiler, 14 Mont. Co. L. Rep. 58; 15 Lanc. L. Rev. 165.

was held that gas pipes passed to the vendee of a store, although they were put in by the tenant of the vendor, who had a right to remove them as against his landlord.¹⁹ In Ohio it was held by the *nisi prius* court that where chandeliers and gas brackets were affixed to a building in a manner to indicate an intention on the owner's part to make them a part of such building, they were fixtures and passed to the vendee.²⁰ So in Pennsylvania a gas machine, a part of a suburban dwelling house, put in at the time the house was built, and connected with it by underground pipes running through the foundation walls and joining in the house permanent machinery; and to this machinery was connected the ordinary gas pipes of a house, was held to be subject to a mechanic's lien, and therefore part of the realty.²¹ But it has also been held in that State that gas fixtures do not pass to the vendee of the realty, in the absence of an intent that they shall be included in the sale.²² In California a hotel was conveyed "with the appurtenances thereunto belonging." This conveyance was made in pursuance of a written agreement providing that the vendor might remove his furniture, carpets and pictures, but none of the "permanent fixtures and appurtenances." Under these facts the court considered that there was a special agreement concerning the gas fixtures and fittings, the kitchen range, water filter, tanks and mosquito screens, to the effect that they were to go with the real estate.²³

¹⁹ *Smyth v. Sturges*, 108 N. Y. 495; 15 N. E. Rep. 544; affirming 30 Hun 89.

²⁰ *Central Trust, etc., Co. v. Cincinnati, etc., Co.*, 26 Wkly. Law Bull. 149; 10 Ohio Dec. Rep. 348. So in Pennsylvania. *Daniels v. Detwiler*, *supra*.

²¹ *Light Co. v. Gill*, 14 Pa. Co. Ct. R. 6.

²² *Daniels v. Detwiler*, 15 Lanc. L. Rev. 165; 14 Mont. Co. L. Rep. 58.

²³ *Fratt v. Whittier*, 58 Cal. 126; 41 Am. Rep. 251.

Of course, a special agreement supersedes the general rule and controls the right to remove gas fixtures. *Wall v. Hinds*, 4 Gray 256; 64 Am. Dec. 64.

ARTICLE 2.

TRADE FIXTURES.

§571. Between mortgagor and mortgagee.

§572. Gas pipes in houses.

§573. Landlord and tenant.

§574. When tenant must remove.

§571. Between mortgagor and mortgagee.

The rule between mortgagor and mortgagee is not sensibly different from the rule between vendor and vendee. It is therefore held that gas fixtures and gas ranges are personal property as against the mortgagee of the realty, and can be removed by the mortgagor.²⁴

§572. Gas pipes in houses.

Gas pipes fixed within the walls of houses, and also those leading from the premises in the street to the house, are clearly fixtures, and pass with a conveyance of the house or premises.²⁵ Thus where a water pipe was laid across adjoining land to supply a house with water, it was held that it passed with a conveyance of the house.²⁶ But pipes may be placed in a house

²⁴ *Cosgrove v. Troescher*, 62 App. Div. (N. Y.) 123; 70 N. Y. Supp. 764; *Rogers v. Prattville Mfg. Co.*, 81 Ala. 483; 1 So. Rep. 643 (machinery); *New York Life Ins. Co. v. Allison*, 107 Fed. Rep. 179; 46 C. C. A. 229 (dynamos and engine for driving the dynamos); *Vail v. Weaver*, 132 Pa. St. 363; 19 Atl. Rep. 138 (electrical machinery placed in the building for the purpose of supplying light, after the mortgage was executed, with no intent to make it a part of the realty); *Keeler v. Keeler*, 31 N. J. Eq. 181, 191; *Duffus v. Howard Furnace Co.*, 8 N. Y. App. Div. 567; 40 N. Y. Supp. 925 (portable fur-

nace, where vendor retained the title); *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471; *Caphart v. Foster*, 61 Minn. 132; 63 N. W. Rep. 257; 52 Am. St. Rep. 582 (also an electric annunciator, but not a steam radiator); *criticising National Bank v. North*, 160 Pa. St. 303; 28 Atl. Rep. 394).

²⁵ *Smyth v. Sturges*, 108 N. Y. 495; 15 N. E. Rep. 544; affirming 30 Hun 89; *Ex parte Wilson*, 2 Mont. and Ayr. 61; 4 Dec. and Chit. 143; 4 L. J. (N. S.) Bank 24.

²⁶ *Philbrick v. Ewing*, 97 Mass. 133.

under such circumstances as to show an intent that they should remain personal property. Such was the case where the owner of a store room contracted with an electric lighting company to put electric wires and fixtures in his store room, and agreed to use the light for one year and pay for it "in conformity with the regulations endorsed" on the written and signed contract. One of these regulations was that the company should have access to the premises for the removal of the lamps or wire. Channels were dug in the plastering of the walls of the rooms, the wires placed in them, fastening them with staples, and then covered over by filling such channels with mortar, restoring the walls as nearly as possible to their former condition. It was held that the ownership of the wires was a question of the intention of the parties, and was for the jury.²⁷

§573. Landlord and tenant.

The right of a tenant to remove fixtures from the rented premises practically stands on a contract between him and his landlord, usually an implied one, but not infrequently an express one. The law does not presume that fixtures placed by the tenant on the rented premises, in order to enable him to use or enjoy them, and which can be removed without injury to such premises, were intended either by him or his landlord to become a part of the realty, and to remain after the tenancy had expired. If there is an express contract concerning their removal, that will control; but in the absence of such a contract, the law raises an implied contract that the tenant can remove them if he perform the act of removal at a proper time and in a proper manner. Usually he must remove them during the term of the tenancy. "A great part of the gas fixtures, such as the gasometers and the apparatus for generating gas, as between landlord and tenant, are movable property. They would, it is

²⁷ Harrisburg, etc., Co. v. Goodman, 129 Pa. St. 206; 19 Atl. Rep. 844. See Wall v. Hinds, 4 Gray 256. 64 Am. Dec. 64. where gas pipes were held to be removable

fixtures as between landlord and tenant. Gas mains. Poughkeepsie Gas Co. v. Citizens' Gas Co., 20 Hun 214.

true, pass to the heirs-at-law with the inheritance, or between grantor and grantee, as fixtures to the real estate; but as between landlord and tenant, the latter has a right to remove them during the term."²⁸ Such fixtures are regarded as his personal property during the term of the lease, especially if they are trade fixtures.²⁹ Thus gas pipes passing from the cellar through the floors and partitions, retained in their places by metal bands, are such fixtures as a tenant may remove, even though some of them pass through wooden ornaments of the ceilings, which are cut away for their removal.³⁰ If an incoming tenant purchase from his landlord the fixtures upon the demised premises, they of course become personal property, and he may remove them.³¹

§574. When tenant must remove.

One line of authority expressly limits the right of the tenant to remove the fixtures to the term of his lease, giving him the right to remove them at any time during the lease, or while he continues tenant; but after the expiration of such lease and the surrender of the premises to the landlord, he cannot enter on such premises to remove the fixtures. And the reason of this rule is said to be that when he quits the premises, leaving his fixtures behind him, it will be presumed that he intended to aban-

²⁸ Hays v. Doane, 11 N. J. Eq. 84; Elliot v. Bishop, 10 Exch. 512; Childs v. Hurd, 32 W. Va. 66; 9 S. E. Rep. 362; Seeger v. Pettit, 77 Pa. St. 437; Guthrie v. Jones, 108 Mass. 191.

²⁹ Kile v. Giebner, 114 Pa. St. 381; 7 Atl. Rep. 154; *Ex parte* Morrow, 1 Lowell's Dec. 386; 2 N. B. R. (2d ed.) 665.

³⁰ Wall v. Hinds, 4 Gray 256; 64 Am. Dec. 64. This is particularly true if there be an agreement to that effect.

A tenant may remove a tile floor and an electric light apparatus placed in a building for business purposes, if he leave the building

in as good condition as it was at the beginning of the lease. Ross v. Campbell, 9 Colo. App. 38; 47 Pac. Rep. 465.

That a tenant may remove, see *Wilde v. Waters*, 16 C. B. 637; 24 L. J. C. P. 193; 1 Jur. (N. S.) 1021; *Elliott v. Bishop*, 24 L. J. Exch., p. 39; 42 L. J. Exch., p. 229; 10 Exch. 496.

³¹ *Ryall v. Rolle*, 1 Atk., p. 175.

Generally, that a tenant may remove gas fixtures he puts in, see *Elliott v. Bishop*, 10 Exch. 496; 24 L. J. Exch., p. 39; 42 Id., p. 229; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

don them.³² But the rule that he must remove them during the tenancy may be modified by an express agreement. Thus where property by an express agreement between the tenant and landlord was made personal property, it was held that it could not be contended that it was the tenant's fixtures, and therefore movable, only during the tenancy.³³ So where it was agreed when the lease was surrendered, that the landlord should sell the fixtures for the tenant's benefit, and at the request of the landlord the tenant left them on the premises, it was held that the latter had not lost his right to them, and that the former was liable for their conversion.³⁴ So acceptance of a new lease by the tenant is not a waiver of his right to the trade fixtures he has placed upon the premises, although there be no agreement with respect to them, unless such new lease in clear terms cover the fixtures upon the premises leased.³⁵ But some authorities extend the rule farther than those just cited would indicate. Thus it was decided in New York that trade fixtures did not cease to be the tenant's property by reason of the mere fact that he did not remove them during his term; and that he could "remove them after his term expired without subjecting himself to any damages for such removal, even though he be liable to an action for trespass for an entry on the premises demised." It was also held that the tenant could mortgage them by a chattel mortgage, and that they could be levied upon with an execution against him.³⁶ In Illinois it was held that the tenant had a reasonable time within which to remove trade fixtures, and what was a reasonable time was a proper question for the jury, under the instructions of

³² Childs v. Hurd, 32 W. Va. 66; 236; 25 N. E. Rep. 362. reversing 9 S. E. Rep. 362; Friedlander v. 4 N. Y. Supp. 694; East Sugar Loaf
Linder, 30 Neb. 783; 47 N. W. Rep. Coal Co. v. Wilbur, 5 Pa. Dist. Rep.
83; Wall v. Hinds, 4 Gray 256; 64 202.
Am. Dec. 64; Hays v. Doane, 11 N.
J. Eq. 84.

³³ Lake Superior Ship Canal, etc.,
Co. v. McCann, 86 Mich. 106; 48
N. W. Rep. 692.

³⁴ Thorn v. Sutherland, 123 N. Y.

³⁵ Second National Bank v. O. E.
Merrill Co., 69 Wis. 501; 34 N. W.
Rep. 514; Wright v. McDonell,
38 Tex. 140; 30 S. W. Rep. 907.

³⁶ Lawrence v. Kemp, 1 Duer.

363.

the court.³⁷ This is undoubtedly true where a forfeiture of the lease takes place; and if the tenant is denied the right after the forfeiture to remove them, he may bring an action therefor, especially if the lease contain an agreement giving him the right to make such removal.³⁸

ARTICLE 3.

OIL AND GAS LEASE FIXTURES.

- §575. Coal and mineral leases.
- §576. Oil and gas lease fixtures.
- §577. Conveyance or mortgage of fixtures.
- §578. Special contract controls.
- §579. Gas and oil pipe lines.

§575. Coal and mineral leases.

The right of a lessee in an oil or gas lease does not differ from the right of a tenant in an ordinary agreement for the renting of premises for trade purposes. There is no difference, taking into consideration the character of the fixtures, in this respect, between a lease to bore for oil or gas and one to dig for coal or other minerals. In the case of a mere parol license to mine for coal, and the license is revoked, the licensee may remove his fixtures within a reasonable time; and there is no reason why the same is not applicable to an oil or gas license or lease.³⁹ Thus a steam engine, boilers, and pumps, sunk into a ledge of rock in order to get a level, and covered by a shed for shelter, used in working a mine, is a trade fixture, and may be removed by the tenant, unless the right to remove it is controlled by an agreement, or by some local usage.⁴⁰ The rule extends not only to

³⁷ *Berger v. Hoerner*, 36 Ill. App. 360; *Nigro v. Hatch* (Ariz.), 11 Pac. Rep. 177.

³⁸ *Sattler v. Opperman*, 30 Pittsb. Leg. J. (N. S.) 205. See also *Potter v. Gilbert*, 177 Pa. St. 159; 35 Atl. Rep. 597; 35 L. R. A. 580.

³⁹ *Desloge v. Pearce*, 38 Mo. 588;

Springfield, etc., Co. v. Cole, 130 Mo. 1; 31 S. W. Rep. 922.

⁴⁰ *Merritt v. Judd*, 14 Cal. 60; *Wake v. Hall*, 7 Q. B. Div. 295; 8 App. Cas. 195; *Hewitt, etc., Co. v. Watertown, etc., Co.*, 65 Ill. App. 155.

a steam engine and machinery connected therewith, but to all fixtures or appliances used for the purpose of hoisting coal from the mine. These remain the property of the lessee.⁴¹ Thus a sale of a seller's interest in a "colliery" includes "all the movable property belonging to and used at the place in mining coal"; and it is not error to so instruct the jury, and add "that the word 'colliery' is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which coal is mined."⁴² Where a lease was made for the purpose of mining iron ore, and it was provided that the lessee would, at its termination, peaceably surrender the premises, "and other improvements and erections that may be thereon — engine, boilers, machinery, tools, implements, and other movable personal chattels excepted; it was held that this agreement made engines and boilers personal property as between the lessor and an execution creditor of the lessee, and that they could not be treated as trade fixtures.⁴³ Where A. entered into an agreement with B. to put in machinery to bore a salt well on the latter's land, in consideration of which he was to have a share of the property and business, but never sunk the well, and B. sold and conveyed the lands to C.; it was held that the machinery did not pass by the conveyance; for the reason that the machinery was put on the premises for a temporary purpose, to sink a well, and as it would be removed without injury to the freehold, it did not become realty, not being so intended or especially adapted for permanent use as a part of the freehold.⁴⁴ So a sale of a coal mine does not include, im-

⁴¹ *Dobschuetz v. Holliday*, 82 Ill. 371; *Hewitt, etc., Co. v. General Electric Co.*, 61 Ill. App. 168; *Audenried v. Woodward*, 4 Dutch. (N. J.) 265; *Davis v. Moss*, 38 Pa. St. 306; *Heffner v. Lewis*, 73 Pa. St. 302 (a railroad to the mine); *Williams' Appeal*, 1 Monaghan (Pa.), 274; *Montooth v. Gamble*, 123 Pa. St. 240; 16 Atl. Rep. 594 (houses); *Ritchie v. McAllister*, 14 Pa. Co. Ct. Rep. 267 (railroad).

⁴² *Carey v. Bright*, 58 Pa. St. 70.

⁴³ *Lake Superior Co. v. McCann*, 86 Mich. 106; 48 N. W. Rep. 692.

A mining flume running along the bank of a river to a mine was held not exempt from taxation under a statute exempting mining claims. "It is not affixed to the claim so as to become a part of it. It is rather to be regarded as machinery, or as apparatus useful in mining." *Hart v. Plum*, 14 Cal. 148.

⁴⁴ *Bewick v. Fletcher*, 41 Mich. 625.

plements, tools, and movable articles of the mine;⁴⁵ but it does include the machinery and fixtures of the mine, the trouble generally being to determine what is and what is not a fixture.⁴⁶

§576. Oil and gas lease fixtures.

A lessee of land, to bore for oil, who does not find any oil has a right to remove not only the machinery used in sinking the well but also the casings in the wells, unless there be a contract to the contrary concerning their removal.⁴⁷ And a levy of an execution upon "all right, title and interest of the defendant [lessee] of, in and to a certain lease-hold estate situate," etc., "together with the oil wells, engines, boilers, engine houses, derricks," etc., etc., "and all the machinery and fixtures belonging to said well and lease," covers the fixtures of the leasehold.⁴⁸ Where a lease of ground was given for three years and as much longer as oil or gas was found in paying quantities, with the right to remove all fixtures "at any time," it was held that the fixtures must be removed within a reasonable time after the expiration of the three years' period, or within a reasonable time after the time it was determined that neither oil nor gas could be secured in paying quantities; and that the phrase "at any time" could not be stretched so as to include an unreasonable length of time after the lease had in fact terminated. "The lease was for a fixed period," said the court, "to be extended to an indefinite period, and the extension to depend upon what the future might develop. The right to enter at any time, and the right to remove machinery at any time, was predicated on that part of the term that was uncertain, that is, after three years the

⁴⁵ Fisher v. Dixon, 12 Cl. and F. 312.

⁴⁶ Dudley v. Warde, Amb. 113.

In Colorado a statute provides that the terms "land" and "real estate" shall embrace claims. Under this statute it is held that an engine placed in an engine house on a frame bolted down to timbers sunk in the ground and earth tamped around them, and a boiler

set on rock work, with the ordinary connections with the engine, were fixtures. Roseville Alta Mining Co. v. Iowa Gulch Mining Co., 15 Colo. 29; 24 Pac. Rep. 920.

⁴⁷ Siller v. Globe Window Glass Co., 21 Ohio C. C. 284; 10 Ohio Cir. Dec. 784.

⁴⁸ Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103.

lessee had the right at any time to enter and drill additional wells, if oil or gas was being produced in paying quantities; and had the right, although the three years had passed, to remove the machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities. If this construction is correct, then the rule of law as to removal of fixtures, as when it depends upon a contingency, and that is, that the removal must be made within a reasonable time; or in other words, the law in such cases allows the tenant a reasonable time for the removal of the fixtures. Here the lessees, if oil or gas has been found in paying quantities, would have had a reasonable time within which to draw their casing and remove their derricks after it had become apparent that the operation of the wells was no longer profitable, let this be soon or long after the expiration of three years; at any time when they thought it would no longer pay to operate their wells which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells. Under the facts as we have them in this case, however, operations ceased on this lease in April, 1887; a dry hole was found, nothing was done between the completion of this well and the time when the lease expired in November, 1888, and after that four years were allowed to expire before an attempt to remove these fixtures was made. In our opinion, this was too late. If, under the words 'at any time' the lessee could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be removed within a certain time, is to read something into the contract that is not there."⁴⁰ Contingencies may arise that will not require the lessee to remove his fixtures at the expiration of the lease, or even within what would have otherwise been a reasonable time. Thus where there arose a dispute between the lessor and lessee as to when the lease expired and the controversy was taken into the courts, and was decided against the lessee, it was held that the lessee could remove the fixtures at the termination of the

⁴⁰ *Shellar v. Shivers*, 171 Pa. St. 569; 33 Atl. Rep. 95.

suit, although the lease had long before expired; and if the lessor had refused to permit the lessee to so remove them, he was liable in damages.⁵⁰ A covenant on the part of the lessee to develop gas or oil land leased is separate and apart from an agreement of the lessor that the lessee might remove the fixtures at the expiration of the lease or within a reasonable time thereafter; and if the lessor seize the fixtures for the reason that the lessee has failed to keep his covenant, he will be liable in damages.⁵¹

§577. Conveyance or mortgage of fixtures.

A conveyance of the lands whereon are gas or oil wells owned and worked by the owners of the land will carry with it those fixtures attached to the freehold necessarily used in such work: and so a conveyance of the leasehold interest by the lessee will also carry such fixtures, unless there be an agreement to the contrary.⁵² But it will not carry oil in tanks on the leased premises.⁵³ Tanks for holding the oil, placed by the owner of the land upon a foundation of earth and lumber, are presumed to be such permanent accessions to the land as will subject the land to a mechanic's lien, and of course pass with a conveyance thereof.⁵⁴ In Pennsylvania an Act of the legislature⁵⁵ provides that it shall "be lawful for every lessee for a term of years of any colliery, mining land, manufactory, or other premises, to

⁵⁰ *Sattler v. Apperman*, 30 Pitts. L. J. (N. S.) 205. See also *Wright v. McDonnell*, 88 Tex. 140; 30 S. W. Rep. 907.

⁵¹ A steam engine in a coal mine for the use of the tenant, and removable without injury to the mine, is not a fixture. *Hewitt, etc., Co. v. Watertown Steam Engine Co.*, 65 Ill. App. 153.

A derrick erected by a tenant in a quarry, by placing a post upright in a socket in the ground, is a trade fixture, and is not subject to a mechanic's lien. *Honeyman v.*

Thomas, 25 Ore. 539; 36 Pac. Rep. 636.

⁵² *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 15 Colo. 29; 24 Pac. Rep. 920; *Ritchie v. McAllister*, 14 Pa. Co. Ct. Rep. 267.

⁵³ *McQuire v. Wright*, 18 W. Va. 507.

⁵⁴ *Parker Land, etc., Co. v. Reddick*, 18 Ind. App. 616; 47 N. E. Rep. 848. *Contra*, *Seider's and International, etc., Co. v. Lewis*, 7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80.

⁵⁵ Act of April 27, 1855; P. L. 369.

mortgage his or her lease or term in the demised premises, with all buildings thereon, to the lessee belong[ing] and thereunto appurtenant, with the same effect as to the lessee's interest and title, as in the case of mortgaging a freehold interest and title as to lien, notice, evidence and priority of payment"; but the mortgage and lease must be placed of record in the proper county, and the mortgage can in no wise interfere with the landlord's right, priority or remedy for rent.⁵⁶ After the passage of the Act it was held that in a mortgage of the leasehold, including "all machinery and fixtures thereon — one boiler, one engine, two tanks, etc.— and all and singular the appurtenances thereunto belonging," was included a leather belting; and that it was competent to show by parol evidence that the belting was actually on the leasehold premises when the mortgage was executed, and was embraced therein.⁵⁷ The word "fixture" as used in this Act has been held to include mine cars and all such machinery and appliances as are essential to the operation of a colliery, but not prop-timber.⁵⁸ The mortgage of an electric lighting plant, including boilers, engines and dynamo, "with all the appurtenances thereunto belonging," includes masts erected in the street and wires strung thereon, along which the electric current was conducted to electric lamps.⁵⁹ Without the aid of a statute, a tenant may so mortgage his leasehold as to cover the fixtures upon it.⁶⁰ And he may bring under a mortgage of the

⁵⁶ This act was construed to apply to oil land or gas leases. *Gill v. Weston*, 110 Pa. St. 312; 12 Atl. Rep. 921.

⁵⁷ *Gill v. Weston*, *supra*.

⁵⁸ *Baker v. Atherton*, 15 Pa. Co. Ct. Rep. 471.

⁵⁹ *Fechet v. Drake* (Ariz.), 12 Pac. Rep. 694.

Where the owner of a ranch conveyed a part of it, excepting "all oils, petroleum, asphaltum, and other minerals," and then conveyed to another the remaining part of the ranch, reserving the minerals; and the first grantee "granted and

sold" to the second grantee "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever" situated upon any portion of the ranch, it was held not to be a mere conveyance of these as chattels, but it gave the right to occupy sufficient land for the use of the property for the purpose and in the way it had theretofore been operated. *Dietz v. Mission Transfer Co.*, 95 Cal. 92; 30 Pac. Rep. 380.

⁶⁰ *Lawrence v. Kemps*, 1 Duer. 363.

In *Bainbridge on Mines and Min-*

existing machinery and plant of a leasehold, after acquired machinery or fixtures placed upon the premises during the continuance of the security; ⁶¹ but the terms of the mortgage must expressly include such after acquired property, for a mere mortgage of existing property will reach after acquired property. ⁶²

erals (edition of 1900, 5th), 263, the English law with respect to mining fixtures is stated as follows: "And regarding the removability of fixtures properly so called, and their sale or devolution separately from the land or mine, the following points appear to be established, namely — Firstly, as between an executor or administrator and the devisee or heirs — whether the deceased was the owner in fee of the land or of the mine, the devisee or heir will, as a general rule, be entitled to the machinery also, which has been annexed to the freehold, and which has become a part of the inheritance — as *e. g.*, in the case of a salt mine or salt works (Lawton v. Salmon, 1 H. B. 259); and the special circumstances must be shown to alter that rule (Lowther v. Cavendish, 1 Eden 99; Wood v. Gaynon, 1 Amb. 395; Lushington v. Sewell, 1 Sim. 435); also, where the *corpus* of any machinery or fixture belongs to the heir or devisee, he is entitled to all the parts capable of being used in a detached state, if they really belong to it. (Fisher v. Dixon, 12 Cl. and F. 312). But, secondly, as between the tenant for life and the person entitled in remainder or reversion — the executor of the tenant for life will, as a general rule, be entitled to the machinery and fixtures. Thus, where a fire engine for working a collier had been set up by the tenant for life; and it was proved to be

customary to remove such works; but it appeared also that the engine could not be removed without tearing up the soil and destroying the brick work — Lord Hardwicke decided that the engine was part of the personal estate of the late tenant for life, and went to his executor (Lawton v. Lawton, 3 Atk. 13); and he applied the same rule in a subsequent case to a deceased tenant in tail (Dudley v. Warde, Amb. 113; Lawton v. Salmon, 1 H. Black 259). And, thirdly, as between a mining lessee and his lessor, a still greater liberality in favor of the lessee or of his executor prevails (Grymes v. Boweren, 6 Bing. 439) subject only to this condition, namely, that the lessee or his executor must exercise his right to remove the fixtures during the continuance of the term or during what has been termed the excrescence of the term (Heap v. Barton, 12 C. B. 274; Penton v. Robart, 2 East 88) — *scil.*, because he will otherwise be considered to have relinquished his claim (Minshull v. Lloyd, 2 M. and W. 459; Weston v. Woodcock, 7 M. and W. 14)." See also Hewitt v. Watertown Steam Engine Co., 65 Ill. App. 153 (steam engine in coal mining for use of tenant).

⁶¹ Holyrod v. Marshall, 2 Giff. 382; 2 DeG. F. and J. 596; 3 L. J. Ch. 655; 30 L. J. Ch. 385; 3 L. J. Ch. 193.

⁶² Reeve v. Whitmore, 33 L. J. Ch. 63.

§578. Special contract controls.

Special agreements relating to fixtures contained in leases, especially in mining leases — often settle the rights of the parties with reference to machinery and fixtures. Thus where a lease of land and salt mines gave the lessee the right to erect a warehouse, build quays, salt pits and other works, reserving a certain rent for every salt pan then or thereafter erected by the lessee; and the lessee *covenanted to leave all the buildings, quays and salt works in good repairs* — it was held that he could not remove any salt pans he had built.⁶³ Where a lessee covenanted to leave all the “fixed materials,” except the salt pans and other movable articles used at the salt works; and he assigned the lease; and in a renewal of the lease the assignee covenanted to give up possession of the premises, with all improvements, cisterns, doors and other fixtures and appurtenances, stipulating for the right to take away the salt pans and other articles used, it was held that he had only the right to take such fixtures as could properly be called tenant’s fixtures.⁶⁴ But where a lessee of a coal mine and iron works covenanted to yield, at the end of his term, all “ways and roads” in good repairs, and fit for immediate future use; it was held that the agreement did not cover tram plates and wooden sleepers of the railroad laid down by the lessee, which had been seized under an execution against him, but that it did cover rails and sleepers in place at the time of the lease, it being the intention of the lessor and lessee to bind only those in existence at the

As against a trustee in bankruptcy, the mortgagee of a mine, with engines and other fixtures, is in general, entitled to all the machinery fixed to the freehold (*Mather v. Frazer*, 2 Kay and J. 536; 25 L. J. Ch. 361; *Whitmore v. Empson*, 23 Beav. 313; 26 L. J. Ch. 364); but not to the movable fixtures, which vest in the trustee. *Whitmore v. Empson*, *supra*. Usually, however, the mortgage must contain a clause authorizing the mortgagee to sever

the fixtures before he can claim them. *Mather v. Fraser*, *supra*: *Begbie v. Fenwick*, L. R. 8 Ch. App. 1075, note; *Ex parte Daglish*, *In re Wilde*, L. R. 8 Ch. App. 1072; *Ex parte Barclay*, *In re Joyce*, L. R. 9 Ch. App. 576; *Batchelor v. Yates*, 38 Ch. Div. 112.

⁶³ *Earl of Mansfield v. Blackburne*. 3 Scott (N. S.) 820; 6 Bing. N. C. 427.

⁶⁴ *Summer v. Bromilow*, 34 L. J. Q. B. 130.

time of the lease and not those thereafter acquired; and that it was not the intention to bind the lessee to continue for a long term of years the repairs of railroads which might have become useless. It was considered that the terms of the covenant were satisfied by the railroad being left in a proper state for the relaying of rails by the lessor.⁶⁵

§579. Gas and oil pipe lines.

We have already seen that a water pipe laid across an adjoining lot to supply a house with water passes with a convey-

⁶⁵ *Beaufort (Duke) v. Bates*, 3 DeG. F. and J. 381; 31 L. J. Ch. 481; *Bird v. Crabb*, 30 L. J. Ex. 318.

So if a tenant purchase the fixtures of his landlord, he may remove them. *Ryall v. Rolle*, 1 Atk., p. 175. See also *Handforth v. Jackson*, 150 Mass. 149; 22 N. E. Rep. 634.

The owner of mineral land leased it for the purpose of mining, the lease providing that all timbers placed in the shafts should be regarded as fixtures; and in case of a surrender of the lease the lessee would permit a re-entry before the actual surrender to install pumping machinery, and that the lessor should have the right to buy all mining machinery and buildings erected during the term, and if he did not purchase them, the lessee should have sixty days after the termination of the lease within which to make a renewal of them. Another clause provided for a leasing by the lessor of the premises, machinery and appurtenances. It was held that the machinery and appliances on the land were trade fixtures, placed there by the lessee, did not at once become a part of the freehold, but that the lessee had

such an interest in them that he could place a chattel mortgage upon; yet upon the lessor recovering possession of the land by summary proceedings for non-payment of rent, before the removal of such trade fixtures and without an assertion of a right by the lessee to remove them or his mortgagee, they became the lessor's property as a part of the freehold, and the mortgagee could not thereafter remove them. *Massachusetts National Bank v. Shinn*, 18 N. Y. App. Div. 276; 46 N. Y. Supp. 329.

One who erects a building on another's land by license may remove it, if its removal be practicable and works no serious injury to the land, on the termination of the license. *Ingalls v. St. Paul, M. and M. Ry. Co.*, 39 Minn. 479; 40 N. W. Rep. 524.

If one in possession of land, under contract of purchase, voluntarily erects a house thereon, without either an express or implied agreement with the land owner that it shall remain personal property, it becomes part of the realty, and belongs to the owner of the soil. *Kingsley v. McFarland*, 82 Me. 231; 19 Atl. Rep. 442.

ance of the house.⁶⁶ A gas company which has condemned a right of way for its line may enter and remove its pipe line when the supply of gas has failed; but it must remove them at a time and in a manner least harmful to the land owner, and subject to the payment of a compensation for any actual injury to growing grain or grass. Should the field be a meadow, then it must pay for all substantial injuries to the turf beyond the mere opening and filling of the trench in which the pipe lies.⁶⁷ The right to remove them is made to hinge on the failure of gas.⁶⁸ Pipe lines of artificial and natural gas companies laid in the street, with the consent of the municipality, remain the personal property of the company.⁶⁹ But where the pipe line was buried two and a half to three feet on land of persons from whom the pipe line company had, by deed, acquired a right of way, and was used to carry crude petroleum, it was held that it was "real estate" within the meaning of the New Jersey tax law.⁷⁰ A gas company that lays a pipe line through lands without permission of the owner is not entitled to maintain a suit against the land owner to enjoin him from removing it; for by its act of placing it in the soil he became the owner of it, and the pipe line cannot be treated as a fixture.⁷¹

⁶⁶ *Philbrick v. Ewing*, 97 Mass. 133.

⁶⁷ *Clements v. Philadelphia Co.*, 184 Pa. St. 28; 38 Atl. Rep. 1090; 28 Pitts. L. J. (N. S.) 344; 41 W. N. C. 321; 39 L. R. A. 532.

⁶⁸ In England gas pipes in the ground are taxed or rated to the proprietors in the parish where they are laid, although the ownership of the land itself may be in other individuals. It is held that the proprietors of the pipes are in the possession of the space they occupy. *Regina v. Rockdale W. W. Co.*, 1 M. and S. 634; *Regina v. Birmingham Gas Co.*, 1 B. and C. 506; *Regina v. Brighton Gas Co.*, 5 B. and

C. 466; *Regina v. West Middlesex W. W. Co.*, 1 E. and E. 716; *Sheffield United Gas Co. v. Sheffield*, 4 B. and S. 135.

⁶⁹ *Memphis Gaslight Co. v. State*, 6 Coldw. (Tenn.) 310.

⁷⁰ *State v. Berry*, 52 N. J. L. 308; 19 Atl. Rep. 665.

In Texas poles, wires and lamps of an electric lighting company erected in the street for lighting purposes, are real property. *Keating etc., Co. v. Marshall etc., Co.*, 74 Tex. 605; 12 So. W. Rep. 489.

⁷¹ *Windfall etc., Co. v. Terwilliger*, 152 Ind. 364; 53 N. E. Rep. 284.

CHAPTER XXVIII.

NUISANCES.

- §580. Scope of chapter.
- §581. Pollution of well or spring by artificial gas.
- §582. Pollution of running streams.
- §583. Pollution of subterranean waters.
- §584. Damages occasioned by storing or bringing oil on land.
- §585. Gases destroying trees and vegetation.
- §586. Noisome smells.
- §587. Odors from operation of oil wells and works.
- §588. Other disagreeable odors in neighborhood.
- §589. Degree of annoyance.— Question for jury.
- §590. Gas or oil well near house or building.
- §591. Business authorized by government no defence.
- §592. Duty of owner to prevent continuance of damages.
- §593. Evidence.
- §594. Injunction.
- §595. Enjoining erection of gas plant.
- §596. Former recovery a bar.
- §597. Indictment for nuisance.
- §598. Waste of natural gas or oil.

§580. Scope of chapter.

This chapter is limited to instances affecting gas and oil, without any general discussion of the principles applicable to Nuisances, except as they may incidentally be noticed in considering particular instances.

§581. Pollution of well or spring by artificial gas.

Most cases of nuisances with reference to the manufacture and supply of gas have arisen out of the pollution of wells or springs. If a company permit gas to escape from its reservoir or pipes, and it percolates through the soil and enters a well or

spring, injuring the quality of the water, or polluting the water before it enters such well or spring, the gas company will be liable to the owner for the damages thus done, and the fact that other causes contributed to the injury of the water will not bar an action for damages, though it may be shown to affect their amount.¹ So if the wastings from the refuse of its gas works enter the well of an adjoining property owner, rendering it unfit for household purposes or stock it will be liable, such pollution being considered a nuisance.² The company is liable where the rains wash the deleterious substances from the refuse of the works and the water runs along and enters the well or spring at its mouth, corrupting the well or spring water, the same as if it had soaked through the soil.³ A city operating gas works is liable for the pollution of a well the same as a private corporation or an individual would be if it had been operating such works.⁴ A stockholder in the company injured by its act may maintain a suit to abate the nuisance, even to enjoin the continuation of the pollution.⁵ A lessee may also maintain an action for the pollution of a well upon the demised premises; *⁶ but his right of action is limited to recover for the injury to his possessory interest, while the landlord must bring the action for any injury to the reversion.⁶ Directors of a gas

¹ *Sherman v. Fall River Works Co.*, 5 Allen 213; *Columbus Gas-light Co. v. Freeland*, 12 Ohio St. 392; *Millington v. Griffiths*, 30 L. T. 65; 23 Gas J. 215; *Ottawa Gas-light Co. v. Graham*, 28 Ill. 73; *Brown v. Illius*, 25 Conn. 583; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451.

² *Pensacola Gas Co. v. Pebley*, 25 Fla. 381; 5 So. Rep. 593; *Hendrie v. Lea Bridge, etc., Co.*, 21 Gas J. 949, 989.

³ *Brown v. Illius*, 27 Conn. 84; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Grange v. Pately, etc., Co.*, 14 Gas J. 309.

⁴ *Shuter v. Philadelphia*, 3 Phila.

228. In this case the court said: "A municipal corporation owning and occupying property for public uses is as much subject as a private person to the rule, *sic utere tuo ut alienum non laedas*. The city is as much bound as an individual owner of a lot, to find an outlet for the water on it, without encroaching on his neighbor."

⁵ *Hendrie v. Lea Bridge, etc., Co.*, 21 Gas J. 949, 989.

*⁶ *Hendrie v. Lea Bridge, etc., Co.*, 21 Gas J. 949, 989.

⁶ *Sherman v. Fall River Iron Works*, 2 Allen 524. See *Chapman v. South, etc., Co.*, 61 Gas J. 359, 415, 460.

company have been held personally liable for damages caused to a well by noxious substances escaping from the works of the company of which they were such officers.⁷ Where a statute rendered a gas company liable to a penalty which should "suffer any wastings, etc., to be conveyed into any well," this was held to render it liable though the well contaminated had been disused by the owner for several years. It was also held that the facts of non-user and the closing of the well because of its having been polluted, even though coupled with the acceptance by the owner of the use of substituted wells of the company, was not such an abandonment of the former as to alter its character and make it no longer a well, nor could a license to pollute it be inferred from such a state of facts.⁸ The word "suffer" as above quoted was applied to an instance of this kind, and the company held liable. In 1854 a gas company erected a tank for gas about one hundred and thirty feet from the plaintiff's well, the site being selected by the company's engineer, and the tank erected on solid sandstone with proper materials. The gas company knew mines in the neighborhood had been worked, but did not know that they had been worked under or near any part of their land. In 1838 there had been workings under half of the company's land, and from 1848 to 1855 these workings had been brought to within one hundred and eighty feet of the company's tank. In consequence of these facts the bottom of the gas tank cracked, and the wastings in it flowed out and through the soil to the plaintiff's well. It was held that the gas company had *suffered* the wastings to flow into the plaintiff's well, and were liable within the meaning of the statute quoted.⁹

⁷ Millington v. Griffiths, etc., Co., 30 L. T. 65; 23 Gas J. 215. See Rex v. Medley, 6 C. and P. 292.

⁸ Millington v. Griffiths, 30 L. T. 65; 23 Gas J. 215.

⁹ Hipkins v. Birmingham, etc., Co., 5 H. and N. 74; 6 H. and N. 250; 9 Gas J. 63. 778; 30 L. J. Exch. 60; 9 W. R. 168. See also Parry v. Croydon Gas Co., 15 C. B. (N. S.) 568; 11 C. B. (N. S.) 578;

10 Jur. (N. S.) 172; 9 L. T. (N. S.) 694; 12 W. R. 212.

Where the defense was that the plaintiff did not use the water before it was befouled for domestic purposes, but for washing and flushing purposes, and for such purposes it was as fit as if it had not been fouled, the judge trying the case said: "A man is entitled to have the water for use in his own

§582. Pollution of running streams.

Questions of the pollution of running streams raise more difficult questions than those relating to the pollution of wells or springs. It is often difficult to reconcile the right of an upper riparian land owner to the use of the water passing in a stream through his estate, in the development of his land, with the right of a lower owner to receive the stream free from pollution. But a distinction must be drawn between the use and abuse of a running stream; as for instance, where it has become polluted by a usage of a part of the water which is returned to the stream in a polluted state, and where deleterious substances are thrown into it without any other use of it being made. Thus where manufacturers of gas threw coal tar and other noxious substances on their gas works premises near a stream and they percolated through the soil, into an adjoining river and rendered its water impure, it was held that the lower riparian land owner

house, even though for the purpose of washing or for the purpose of flushing his drains, uncontaminated by a disgusting smell of gas." *Batcheller v. Tunbridge Wells Gas Co.*, 65 J. P. 680; 84 L. T. 765.

A license to take water from a well gives the licensee a right of action for the disturbance of his easement, but not for the well's pollution. *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598.

For similar cases, see *Merrifield v. Lombard*, 13 Allen 16; *Richmond Mfg. Co. v. Atlantic DeLain Co.*, 10 R. I. 106; *Stockport W. W. Co. v. Potter*, 7 H. and N. 160; 7 Jur. (N. S.) 880; 31 L. J. Exch. 9; *Pennington v. Brinsop Hall Co.*, L. R. 5 Ch. Div. 769; 46 L. J. Ch. 773. The owner of a well polluted is not bound to cement it in order to keep out the odors of gas or drainage from the gas works. *Columbus, etc., Co. v. Freeland*, 12 Ohio St. 392.

In *Ottawa Gaslight and Coke Co. v. Graham*, 28 Ill. 73, it was held, in an action to recover damages for pollution of a well, that in ascertaining the true measure of damages the jury must consider all the circumstances connected with the injury, including the cost of securing a sufficient quantity of water equally pure with that supplied from the well before its injury, the cost of keeping the conductors and other machinery for so doing in repair, and the depreciation of the value of the property by reason of the erection of the gas works, but if the property would sell for the same amount, independent of a rise in similar property, then there would be no loss, but if it would not, then the difference would be the damages sustained. See also *Ottawa Gaslight and Coke Co. v. Graham*, 35 Ill. 346.

was entitled to have the water in a pure condition; and that the gas company was liable.¹⁰ Pollutions arising from the working of coal mines furnish very good instances of the first class of instances we have referred to above. Thus where a mine owner used the water of a stream running through or by his premises to wash iron ore taken from his mine, without which right to so use the water the mine would be valueless, the stream being the only available water, and after using the water taken from the stream returned it, there being no other outlet for it, he resorting to the customary and best means of purifying it before permitting it to flow back into the stream, it was held that the interest of the public and of an important industry was such that the general rule with reference to the pollution of streams must be modified so as not to destroy that interest and such industry. "But there is a limit," said the court, "to this duty to yield, to this claim and right to expect and demand. The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy, or greatly to impair its value to the lower riparian owner."¹¹ In a Pennsylvania case it appeared that a coal mine owner, in the operation of his mine, pumped the water from a stream and returned it in such a state as to render the entire stream useless for domestic purposes; and it was held that the lower owner was without a remedy, his rights *ex necessitate* giv-

¹⁰ Carhart v. Auburn Gaslight Co., 22 Barb. 297; Rex v. Medley, 6 C. and P. 292 (indictment); Robinson v. Coal Co., 50 Cal. 460; People v. Gold Run, etc., Co., 66 Cal. 138; 4 Pac. Rep. 1152.

¹¹ Tennessee, etc., Co. v. Hamilton, 100 Ala. 252; 14 So. Rep. 167; Bear River, etc., Co. v. N. Y. Mining Co., 8 Cal. 327; Satterfield v. Rowan, 83 Ga. 187; 9 S. E. Rep. 677; Edwards v. Allouez Mining Co., 38 Mich. 46; Nelson v. O'Neal, 1 Mont. 284; Columbus, etc., Co. v. Tucker, 48 Ohio St. 41; 26 N. E. Rep. 630; Brown v. Torrence, 88 Pa. St. 186; Gallagher v. Kem-

merer, 144 Pa. St. 509; 22 Atl. Rep. 970; Elder v. Lykens Valley Coal Co., 157 Pa. St. 490; 27 Atl. Rep. 545; Hindson v. Markle, 171 Pa. St. 138; 33 Atl. Rep. 74.

A city, under a statutory power to sue to restrain a nuisance to water courses connected with its water works, cannot, as a public agent, sue to restrain a public nuisance, such statute merely authorizing it to sue as an individual might for the protection of its private property. Newark, etc., Board v. Passaic, 45 N. J. Eq. 393; 18 Atl. Rep. 106.

ing way to the interests of the community, in order to permit the development of the natural resources of the country. In passing on the case the court said: "It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water as it is poured into Meadow Brook is the water which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it. It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. The defendants, being the owners of the land, have a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong. Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, L. J., in *West Cumberland Iron Co. v. Kenyon*,¹² 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case, Brett, L. J., says: 'The cases have decided that where the maxim *sic utere tuo ut alienum non laedas* is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner,

¹² L. R. 11 Ch. Div. 782; 48 L. J. Ch. 793; 40 L. T. 703.

and with due care, the owner cannot be held liable for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is affected. There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the State. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the force of gravity ran out of the drifts and found its way over the defendant's own land to the Meadow Brook. It is clear that for the consequences of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and then to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. But it does not appear from any evidence in this cause, that the mine was conducted by the defendants, in any but the ordinary and usual mode of mining in this country. The deeper strata can only be reached by shaft, and no shaft can be worked until the water is drawn. A drift is in some sense an artificial opening in the land and accumulates and discharges water in a greater volume and extent than would otherwise result from purely natural causes, yet mining by drift has, as we have seen, been held to be a natural user of the land. So, too, we think, according to the present practice of mining, the working of the lower strata by shaft, in the usual and ordinary way, must be considered the natural user of the land for the taking out of the coal, which can be reached by shaft only;

and, as the water cannot be discharged by gravity alone, it must necessarily, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the drainage of the country. We do not say that a case may not arise in which a stream, from such pollution, may not become a nuisance, and that the public interests as involved in the general health and well being of the community may not require the abatement of that nuisance. This is not such a case; it is shown that the community in and around the city of Scranton, including the complainant, is supplied with abundant pure water from other sources; there is no complaint as to any injurious effects from the water to the general health; the community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."¹³ A case of polluting a stream of water in the operation of an oil well arose in this same State. The owner of the well in boring it pumped a large quantity of salt water from it, into a storage tank, and this he drew off and allowed to flow by a natural depression over plaintiff's adjoining land. The plaintiff afterwards diverted it into a neighbor's brook, by plowing a ditch on his own land along the line of depression, thus rendering the water in the brook unfit for use. The owner of the well claimed he was exempt from liability under the case just quoted from, but the court did not so consider the matter, and in passing on the case said: "If the expense of preventing the damage . . . is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could

¹³ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 6 Atl. Rep. 453; overruling same case as reported in 86 Pa. St. 401, and in 94 Pa. St. 302.

justly be called upon to assume. If, on the other hand, however, large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent damage, or should make compensation for the injury done. Between these two extremes lies a debatable region where the cases must stand upon their own facts, under the general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act as to be a substantial deprivation of the right to the use of one's own property. If damages could have been prevented short of this, it is *injuria* which will sustain an action."¹⁴ But where the rights of the public are concerned, a different rule prevails than in instances of a private character. Thus where oil land owners in operating the land for oil, after the separation of the oil from the salt water, permitted the latter to run out upon the surface, and then to run into a stream from which a city drew its water supply, which was thereby rendered unfit for domestic use, the rules laid down above were held to not apply, the rights of the public standing on higher ground than the personal inconvenience and injury of a private citizen. The fact that the city was furnished water by a private corporation was held not to lessen the right of the public to insist that the water should not be polluted; but the court, in reversing the case, ordered an inquiry into the extent and value of the oil operations, whether the wells could be worked without the pollution of the stream, whether the water works company could obtain a supply elsewhere, and the probable expense.¹⁵

§583. Pollution of subterranean waters.

A somewhat different rule applies to liability for the pollution of subterranean currents or streams of water. An English

¹⁴ Pfeiffer v. Brown, 165 Pa. St. 267; 30 Atl. Rep. 844; Hindson v. Markle, 171 Pa. St. 138; 33 Atl. Rep. 74.

¹⁵ Commonwealth v. Russell, 172 Pa. St. 506.

Indictment lies for a pollution of a river with the refuse of gas works. Rex v. Medley, 6 C. and P. 292. See Manhattan Gaslight Co. v. Barker, 7 Robt. (N. Y.) 523.

case furnishes an illustration of the modern rule with reference to the pollution of underground currents. The water for two wells, owned by two persons, was drawn from the same strata. The water in the lower well rose by natural pressure to within twenty-seven feet of the surface, and was then pumped out. This well was befouled by sewerage poured into the upper well by its owner. It was held that the owner of the lower well was entitled to an injunction to restrain the owner of the upper well from pouring sewage into it, or permitting it to run in — to prevent him so using his well as to pollute the lower well — and to recover damages for the injury he had already suffered. In passing on the case the court used the following language, from which it appears that the true cause of action was that the owner of the polluted well allowed his impure sewage to escape from his premises to the lower premises; and the fact that it reached the lower premises by an underground current instead of a surface stream was quite immaterial. “ But it is equally clear that everyone has a right to appropriate percolating water, at all events whilst it is under his land. No one has any property in it — no one has any right to have it come on to his land, but everyone has an unlimited right to appropriate it whilst it is under his land, and may take it all, so as to prevent it going on to the land of others. His neighbor also below him has an equal right, before the person above has taken and appropriated it, to take it all. He has a right to take it to the extent that he may cause the water of the land above to come upon his land and to take it so, as to absolutely dry the land above. Therefore no one has any property in percolating water, but everyone has a right to appropriate the whole of it. Then arises the question as to whether, in respect of such water, any of those persons has any right whatever as against the others. I take it that this percolating water is a common reservoir or source in which no one has any property, but from which anyone has a right to appropriate any quantity. Then the question is whether anyone who has that unlimited right at appropriation, but has no greater rights than any of the others who have it, has a right to contaminate the common reservoir, or whether he is bound not to do anything which shall prevent,

not only his immediate neighbors, but anyone of those who have that unlimited right, from obtaining its true value. It is said that the defendant in polluting this common source, did not pollute that in which the plaintiff had any property. That is true. If all the plaintiff can show is that the common source was contaminated, he cannot before he has appropriated any part of it, maintain any action in respect of the contamination. I do not think that a man can, by experimenting off or on his own land, and finding that the water was contaminated before it came on to his land, maintain an action, for the water did not belong to him, and he had not appropriated it. But it does not follow that he cannot maintain an action when he has appropriated it, and finds that the water which he had a right to appropriate, has been contaminated by that which another person has done to the common source; that is, although no one has any property in that source, yet inasmuch as everyone has a right to appropriate it, he has a right to appropriate it in the natural state, and no one has a right to contaminate the common source so as to prevent his neighbor having his right of appropriation. The next point was that, assuming that to be true, yet, if the person who has that right of appropriation can only exercise it, or has done so by artificial means, the water he took would not have been contaminated, then the percolated water which he got, must be said to have been polluted by his act, and, therefore, he could not maintain an action. I cannot think that that is a true proposition. The question of natural, as distinguished from unnatural user, never applies to a plaintiff. A man has a right to exercise that natural user with all the skill of which he is capable. That question is applicable to a defendant. Therefore, it seems to me, that as long as a plaintiff does not use any means which, as regards his neighbor, are unlawful, but only uses lawful means, however artificial or extensive those means may be, he has a right to use them, and the right to appropriate the common source is not diminished by reason of using those means. Therefore, however he may appropriate the water from the common source, he has a right to have that source uncontaminated by any act of any other person. The question of natural or unnatural user only goes to

this, that, although a defendant does contaminate water or anything else which goes on to his neighbor's land, yet, if that act is only the natural user of the land, then, although by that act he does injure his neighbor, he is not liable, because otherwise he cannot use his land at all. I must say, further, with regard to this common source in respect of which a right of appropriation belongs to every one, the question does not depend upon persons being contiguous neighbors, but if it can be shown that in fact the defendant has contaminated the common source, it signifies not how far the plaintiff is from him, if it is proved that he has been injured by what the defendant has done."¹⁶ There are cases, however, which hold that a land owner is not liable to another land owner injured by noxious substances placed on his land which penetrate to subterranean streams and are carried on to the land of such other land owner by such streams, to his damage; and the fact that he continues to place such noxious substances on his land after he is informed of the damage they are inflicting upon his neighbor, will not render him liable for the damage inflicted after receiving such notice.¹⁷ But the true rule would seem to be that the pollution of subterranean streams will not render anyone causing it liable until he is informed of the damage such pollution is causing, and from thence on he will be liable.¹⁸

§584. Damages occasioned by storing or bringing oil on land.

Every one who brings oil or stores it on land must confine it securely in pipes, tanks or reservoirs, or at least not permit it to escape on to the land of another, whether by flowing over

¹⁶ *Ballard v. Tomlinson*, 29 Ch. Div. 115; 54 L. J. Ch. 454; 52 L. T. 942; 33 W. R. 533; 49 J. P. 692; 24 Am. L. Reg. 634. See *Womersley v. Church*, 17 L. T. (N. S.) 190; *King v. Oxford Co-operative Society*, 51 L. T. 94; *Ball v. Nye*, 99 Mass. 582; *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297.

¹⁷ *Brown v. Illius*, 27 Conn. 84;

Dillon v. Acme Oil Co., 49 Hun 565.

¹⁸ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 6 Atl. Rep. 453. See *Kennard v. Standard Oil Co.*, 89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451, where knowledge that its oil was damaging a spring of water was held not necessary, in order to render the oil company liable.

the surface or percolating through the soil, and if he do not, even though guilty of no negligence, he will be liable for whatever damages is suffered by the oil escaping.¹⁹ This is true of a refining company, although the business of refining oil is perfectly legitimate; yet it must not permit the oil to escape from its premises.²⁰ If the owner of the oil contaminate on his own ground the sources of a spring or well on the ground of another, by spilling or pouring oil upon his own ground, he will be liable to the owner of such spring or well, to the extent of the damage done.²¹

§585. Gases destroying trees and vegetation.

The fumes and gases flowing from the manufacture of gas are often so strong and noxious as to destroy or injure vegetation and crops. When such is the case the person injured is not only entitled to recover damages which he has thus suffered, but also may maintain an action to enjoin the further manufacture of gas in a manner injurious to his trees, vegetation or crops; and usually mere delay in bringing the suit cannot be taken as an acquiescence in the conduct of the gas manufacturer.²² But where vapors from large copper works were injurious to trees, the court instructed the jury that, although every man must so use his property as to not injure the property of another, yet the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view, and therefore in a case of injury occasioned by noxious vapors from a manufactory, to be actionable, the injury must be such as to visibly

¹⁹ *Hauck v. Tidewater Pipe Line Co.*, 153 Pa. St. 366; 26 Atl. Rep. 644; 20 L. R. A. 642; *McGregor v. Camden*, 47 W. Va. 193; 34 S. E. Rep. 936.

²⁰ *Gavigan v. Atlantic Rep. Co.*, 186 Pa. St. 604; 40 Atl. Rep. 834; *Contra*, *Dillon v. Acme Oil Co.*, 49 Hun 565.

²¹ *Kennard v. Standard Oil Co.*, 89 Ky. 468; 12 S. W. Ren. 937; 7 L. R. A. 451; *Berger v. Minneapo-*

lis, etc., Co., 60 Minn. 296; 62 N. W. Rep. 336; *Brady v. Detroit, etc., Co.*, 102 Mich. 277; 62 N. W. Rep. 687; 26 L. R. A. 175.

²² *Broadbent v. Imperial Gaslight Co.*, 7 H. L. Cas. 600; 3 Jur. (N. S.) 221; 5 Gas J. 342; 9 Gas J. 751; affirming 7 DeG. M. and G. 436; 26 L. J. Ch. 276; 5 Jur. (N. S.) 1319; *Sholts Iron Co. v. Inglis*, L. R. 7 App. Cas. 518.

diminish the value of the property; that the locality and all other circumstances must be taken into consideration, and in vicinities where great manufacturing works had been and were being carried on, parties must stand on extreme rights. On appeal this direction was held to be a correct statement of the law.²³ Where the damages are slight, or out of all proportion to the damages that would be inflicted by enjoining the manufacture of the product sought to be enjoined, the court will refuse the injunction and leave the complainant to his action for damages.²⁴ Damages have been allowed for grain injured by gases escaping from a brick kiln,²⁵ so from coke ovens.²⁶

§586. Noisome smells.

Unwholesome and noisome smells proceeding from the manufacture of gas will render the manufacturer liable in damages, if sufficient to produce deleterious results upon the persons living in the region affected by them. "Gas works," said the court, "are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied, and whenever they create a special injury they are to be regarded as a private nuisance, for which an action will lie in respect to the special injury, *e. g.*, a swine sty,²⁷ a lime kiln,²⁸ a dye house,²⁹ a tallow chandler, a furnace,³⁰ a coke oven,^{*30} a brew house,³¹ a fertilizing plant,^{*31} or a tannery.³² It is suf-

²³ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N. S.) 785; 12 L. T. (N. S.) 776; 13 W. R. 1083. See *Sturges v. Bridgman*, 11 Ch. Div. 852; 48 L. J. Ch. 785; 41 L. T. 219; 28 W. R. 200.

²⁴ *Cooke v. Forbes*, L. R. 5 Eq. 166; 37 L. J. Ch. 178; 17 L. T. (N. S.) 371; *Attorney General v. Manchester Corporation* [1893], 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343; 3 R. 427.

²⁵ *Fogarty v. Junction City, etc., Co.*, 50 Kan. 478; 31 Pac. Rep. 1052; 18 L. R. A. 756. See *Camp-*

bell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567.

²⁶ *Robb v. Carnegie*, 145 Pa. 324; 22 Atl. Rep. 649; 14 L. R. A. 329.

²⁷ 9 Rep. 59.

²⁸ 2 Black 141.

²⁹ Hutt 136.

³⁰ Cro Car 570.

^{*30} *McClung v. North Bend, etc., Co.*, 31 Wkly. L. Bull. 9; 9 Ohio Cir. Ct. Rep. 259; 6 Ohio Cir. Dec. 243; 1 Ohio Dec. 247.

³¹ R. Pal. 139; Hutt 136.

^{*31} *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

³² *Carhart v. Auburn Gaslight*

ficient that the manufacture of gas creates smells, smokes, and noxious odors, so annoying to an individual residing near the company's works as to render his premises uncomfortable for habitation. In such an instance there is a private nuisance, for which the company is liable.³³ It is immaterial that the gas company used due care to prevent the escape of gas; for it is the invasion of the premises of another that gives the right of action.³⁴ The rule extends even to the manufacturers of fertilizers and phosphates from which gases escape and affect the paint of houses nearby, and eat the nails of shingles so as to render them loose, and make living in the house uncomfortable and unhealthy, or has driven away customers from the plaintiff's store.³⁵ Mere annoyance may not, however, be sufficient, especially if the action is to enjoin the use of the plant. Some gas will necessarily escape; and any smell of gas is annoying, though not necessarily unhealthy to that degree that it will affect the health of the person it reaches.³⁶ Indeed, the rule has been laid down that to entitle the owner of a dwelling to damages from the storing of oil adjacent to his house, he must suffer substantial and actual injuries in the necessary and reasonable use of his house, his physical comfort or his health, and that mere discomfort and inconvenience are not sufficient to entitle

Co., 22 Barb. 297, citing *Thomas v. Brackney*, 17 Barb. 654. See *Butchers' Union Co. v. Crescent, etc., Co.*, 111 U. S. 746.

³³ *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201; *McGregor v. Camden*, 47 W. Va. 193; 34 S. E. Rep. 936; *Robb v. Carnegie*, 145 Pa. St. 324; 22 Atl. Rep. 649; 14 L. R. A. 329; *Dorr v. Dansville Gaslight Co.*, 18 Hun 274.

³⁴ *Hauck v. Tidewater, etc., Co.*, 153 Pa. St. 366; 26 Atl. Rep. 644; 20 L. R. A. 642; *Bohan v. Port*

Jarvis Gas Co., 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711; *Rosenheimer v. Standard Gaslight Co.*, 36 N. Y. App. Div. 1; 55 N. Y. Supp. 192; *People v. New York, etc., Co.*, 64 Barb. 55; *Carmichael v. Texarkana*, 94 Fed. Rep. 561; *Grange v. Pately, etc., Co.*, 14 Gas J. 309; *Ottawa Gaslight Co. v. Graham*, 28 Ill. 73; *Friburk v. Standard Oil Co.*, 66 Minn. 277; 69 N. W. Rep. 1090.

³⁵ *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562; 39 Atl. Rep. 270.

³⁶ *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257.

him to relief.³⁷ If the manufacture of the gas be a continuing injury, a court of equity will restrain its manufacture in a manner injurious to the plaintiff or his property.³⁸ Injunction, however, will not be granted to restrain the drilling of a gas well near a dwelling house, on account of the prospective noise, stench, pollution of the air, and the danger from fire, explosion, and lightning that would result from the operation of the well at that place, or on account of the overflow of water or oil from it, at least where it is not certain that any water, oil, or gas will be found there; and it is not shown that the gas well could not be so managed as not to be more than slight or barely possible danger or annoyance.³⁹

§587. Odors from operation of oil wells and works.

The owner of property injured by the operation of oil wells or works is not confined to instances where the oil actually enters upon his premises; but he may recover because of noxious odors occasioned by their operation, rendering his premises unhealthy or objectionable to live upon. Slight evidence is sufficient to make out a case for the jury. Thus where it was shown that an oil company spilled oil on its own land adjoining a lot on which a residence was located, and the wind blowing from the direction of the oil premises rendered the residence

³⁷ *Gavigan v. Atlantic Refining Co.*, 3 Lack. L. News 371. See this case on appeal. See *Friburk v. Standard Oil Co.*, 66 Minn. 277; 68 N. W. Rep. 1090.

³⁸ *Broadbent v. Imperial Gaslight Co.*, 7 H. L. Cas. 600; 3 Jur. (N. S.) 221; 9 Gas J. 751; affirming 7 De Gex, M. and G. 436; 26 L. J. Ch. 276; 5 Jur. (N. S.) 1319; *Wragg v. Commercial Gas Co.*, 33 Gas J. 119, 313; *Attorney General v. Gaslight Co.*, L. R. 7 Ch. Div. 217; 47 L. J. Ch. 534; 37 L. T. 746; 26 W. R. 125. See *Butt v. Imperial Gaslight and Coke Co.*, L. R. 2 Ch. 158; 14 L. T. R. 349; 15 Gas J. 139; *McClung v. North*

Bend, etc., Co., 9 Ohio Cir. Ct. Rep. 259.

³⁹ *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532.

The gas company cannot escape liability by showing that the plaintiff produced other noxious odors in his business which contributed to render his premises unwholesome, unless it is also shown that the injury complained of was the result of the combinations of both of the noxious odors, and that those created by the gas company were not independently offensive. *Brown v. Illius*, 27 Conn. 84.

unhealthy to the occupants, his family suffering in consequence thereof, it was held that there was a case made for the jury.⁴⁰ Anything that deprives the occupant of the full use and enjoyment of his property, as making him or his family sick, is actionable, even though the business be a lawful one.⁴¹ The damages may be occasioned merely by the offensive odors, the oil never reaching the premises of the plaintiff, and the recovery may be not only for discomforts suffered,⁴² but even damages to his business, by driving away customers.⁴³ Naphtha tanks may give such offensive odors as to render damages to a nearby residence, and give the owner a cause of action for them.⁴⁴ In order to entitle an owner of a dwelling to damages occasioned by the storage of oil adjacent it, he must show that he has suffered actual and substantial injuries in the reasonable and necessary use of his home to his physical comfort or his health, and it is not enough to show mere inconvenience and discomfort.⁴⁵

§588. Other disagreeable odors in neighborhood.

On the principle that one man cannot justify his conduct by the wrongful conduct of another, it is no defense, in an action to enjoin the operation of gas works in a certain manner, that the neighborhood already contained establishments devoted to noxious and disagreeable trades, unless by long continuance such neighborhood has been so entirely given up to such estab-

⁴⁰ *Friburk v. Standard Oil Co.*, 66 Minn. 277; 68 N. W. Rep. 1090; *Hauck v. Tidewater Pipe Line Co.*, 153 Pa. St. 366; 26 Atl. Rep. 644.

⁴¹ *Gavigan v. Atlantic Ref. Co.*, 186 Pa. St. 604; 40 Atl. Rep. 834.

⁴² *Berger v. Minneapolis, etc., Co.*, 60 Minn. 296; 62 N. W. Rep. 336.

⁴³ *Brady v. Detroit, etc., Co.*, 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175. There must be evidence to show the loss to the business. *Keiser v. Mahanoy Gas Co.*, 143 Pa. St. 276; 22 Atl. Rep. 759.

⁴⁴ *Bohan v. Port Jervis Gas Co.*, 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711.

⁴⁵ *Gavigan v. Atlantic Refining Co.*, 3 Lack. L. News 371; 2 Lack. L. News 239. See this case in 40 Atl. Rep. 834; 186 Pa. St. 604.

Merely allowing oil to stand in a pipe line lawfully laid beneath the surface of the street is not a nuisance, even so volatile oil as naphtha. *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426.

ishments that, an addition to them would not add to the discomfort.⁴⁶ And the fact that the well, for the pollution of which the action was brought to recover damages, had also been polluted by another substance getting into it, will not prevent the owner recovering such damages as the gas company actually caused by its negligent conduct.⁴⁷

§589. Degree of annoyance.— Question for jury.

It is not every annoyance that will give a right of action to the person annoyed. A nuisance is a "thing which will offend an ordinary man, and not a delicate-nosed person."⁴⁸ There are many persons who would be annoyed by gas works being built in the near neighborhood to their dwelling, while others would regard it as a matter of indifference. In instances of charges of nuisance the question is whether the acts done would annoy the average man — they might annoy some and not annoy others like situated; and it is a question for the jury⁴⁹ what amount of annoyance will constitute a nuisance that will give a cause of action to the person annoyed. A property owner is entitled to enjoy his property as it was before the gas works were erected; but it is error to say that he, in the enjoyment of his property is entitled to the same enjoyment as that ordinarily enjoyed by other persons in his neighborhood similarly situated, for the actual question for the jury is not a comparison of his condition with that of his neighbors, but whether the conduct of the gas company caused him an actual damage.⁵⁰ A gas company is responsible in damages for the ordinary smells that usually proceed from such works if they constitute a nuisance; and the fact that it is not negligent does not protect it from liability, if, even in its usual course of business, it injure others.⁵¹

⁴⁶ *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201.

⁴⁷ *Sherman v. Fall River Iron Works*, 2 Allen 524; 79 Am. Dec. 199.

⁴⁸ *Tilly v. Slough Gas and Coke*

Co., 17 Gas J. 231. See *Pottstown v. Murphy*, 39 Pa. St. 257.

⁴⁹ *Rex v. Medley*, 6 C. and P. 292.

⁵⁰ *Columbus. etc., Co. v. Freeland*, 12 Ohio St. 392.

⁵¹ *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257.

§590. Gas or oil well near house or building.

The operation of a gas or oil well in close proximity to a dwelling house or store may amount to a nuisance, the same as the operation of a noisome trade. Each particular case must stand upon its own facts. Thus, in one of the Circuit Courts of Ohio it was held that the drilling and operation of an oil well on a city lot, close to a dwelling house situated on the adjoining lot, was dangerous and annoying, practically destroying the house for the purpose of living in it so long as the well was operated; and if it were shown that an action for damages would be inadequate, a perpetual injunction would be granted, prohibiting its operation.⁵² In Pennsylvania it was held that an oil well located seventy feet and an oil tank eighty feet from a dwelling house was not a nuisance *per se*; but if the escape of gases from it was so great as to require the fires at times in the house to be extinguished in order to prevent an explosion, then the well became a nuisance in fact, and its operation might be enjoined.⁵³ So in Indiana it was held that the drilling of a gas well within one hundred and fifty-two feet of a dwelling house would not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from the operation of the well, or on account of water or oil from the well, if it be not shown with certainty that water, oil, or gas would be found, and also if it be not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended. "In the case at bar," said the court, "the appellant, in locating its brick and tile works, for which natural gas was to be used as fuel, selected a place retired from all residences, and there erected its plant and machinery at great expense. The business so commenced was continued three years before the appellees came and erected their dwelling upon land across the highway from appellant's land and within 200 feet of its brick and tile works. Certainly, therefore, unless the works should constitute a nuisance *per se*, or unless they were so conducted as to become a nuisance in fact, the appellees are not

⁵² Cline v. Kirkbindoe, 12 Ohio C. C. Dec. 517; 22 Ohio Cir. Rep. 527. ⁵³ McGregor v. Camden, 47 W. Va. 193; 34 S. E. Rep. 936.

in a position to demand that equity restrain the appellant in the use of its property. A nuisance *per se*, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway, or to a navigable stream. But a business lawful in itself cannot be a nuisance *per se*, although, because of surrounding places or circumstances, or because of the manner in which it is constructed, it may become a nuisance. Certain kinds of business or structures, as powder houses, or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation. Of course, all persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances, many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to anyone. So, an establishment in some degree offensive, as a livery stable, may be kept so cleanly, so free from anything to offend the sense of sight or of smell, that the proprietor may invite his most fastidious visitors to any part of it; although the same establishment might also be so kept as to be an abomination even to the passerby upon the highway. It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance *per se*. The business is lawful, and, if located in a proper place, and conducted and maintained

in a proper manner, neither the plant nor the well can be treated as a nuisance. Appellees voluntarily selected the neighborhood of appellant's plant for their residence, three years after the appellant began business there; and while this circumstance is not controlling, yet it is one that must be taken into consideration. Nor will it be sufficient answer that appellant's gas well was on the east side of the brick yard at the time the appellees selected their home on a lot within 200 feet of the factory. Experience has shown that gas wells are of short life, and that, after the failure of one well, another, in order to be successful, must be located at a considerable distance from the first. It is averred that there was room for but two wells on this twenty-two-acre tract, and that the location of the proposed well is the farthest possible from the first well and the best that could be selected. It is, besides, admitted by the demurrer to the answer that the appellee, Willard E. Patterson, agreed that the second well should be located within 150 feet of his house; and, while it is possible that such agreement might not bind his co-appellee, yet the circumstance shows that the appellant, in locating its wells at the distance of 152 feet from the appellees' dwelling, was proceeding carefully and with due regard to appellees' rights. Unless, therefore, it should be made to appear that the gas well could not be so managed and maintained as not to be of more than slight or barely possible danger or annoyance to appellees, it does not seem that they could have any sufficient cause to ask that the sinking of the well be restrained. The record does not show, nor have we any means of knowing, that a well at a distance of 152 feet, or over nine rods, from a dwelling house, cannot be so maintained and cared for as not to cause the injury and annoyance claimed to be threatened to appellees in this case. It is remembered that before a court of equity will restrain a lawful work, from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries. In the case before us, it is not shown that even if the gas well were in operation it could not be so managed and cared

for as to avoid all the injuries apprehended. But, more than this, there might never be any gas found in the well. This, the appellees practically concede, when they recite that, although gas might not be found, yet that oil, or even water, coming from the well would be dangerous to their residence. This is altogether too speculative. If the appellant company is willing to invest its money in a well from which may be brought to the surface of the earth an uncontrollable element productive of the evils feared by appellees, it must be allowed to do so at the hazard to itself of all the consequences for which it would thus become liable. But if the well may be sunk, and the gas, oil or water therefrom, if any, can be so controlled and managed as to cause no appreciable injuries to appellees or to any one else then such reasonable and lawful use of property ought not to be prevented by the courts. To do so would be sheer usurpation of arbitrary power.”⁵⁴

§591. Business authorized by government no defense.

A gas company cannot successfully defend against the charge of a nuisance on the ground that its business has been authorized by the government or by the legislature, even though it be chartered by a special act of the legislature and empowered to conduct its business where its works are located. Such a charter authorizes it to conduct its business in a lawful and not an unlawful manner. Works authorized by the legislature and carried on without negligence may in fact involve a nuisance for which the company will be liable. Thus where in a special act of parliament incorporating a gas company it was enacted that the gas should be of a certain purity, it was held that the company was not justified in causing a nuisance, even if the gas could not be made of a sufficient purity without so doing.⁵⁵

⁵⁴ *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532. *Rail Co.*, L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. (N. S.) 238; 18 W. R. 12 (vibration caused without negligence, by the passing of trains after the railway is brought into use); *London, etc., R. Co. v. Truman*, 11 App. Cas. 45;

⁵⁵ *Attorney General v. Gaslight and Coke Co.*, L. R. 7 Ch. Div. 217; 47 L. J. Ch. 534; 37 L. T. 746; 26 W. R. 125; *Brand v. Hammersmith*

But if the particular location of the gas company's works has been expressly authorized by its charter or a statute, then the person damaged must show that the company has been guilty of negligence in the conduct of its works.⁵⁶ The fact that a gas company has a contract to light the streets of a city and that if it be enjoined it will not be able to carry out its contract with the city, and virtually with the public, is no defense.⁵⁷

§592. Duty of owner to prevent continuance of damages.

The owner of property whose rights to it have been wrongfully invaded by a gas company is not required to take active steps to abate the nuisance created or to lessen the damages. It can neither justify its conduct nor lessen its liability by setting up the property owner's failure to assume an active role in order to reduce its liability. Thus, it was held that a well owner was not bound to cement his well in order to prevent foul water entering it from the gas works.⁵⁸ But if he does take active steps to abate the nuisance or prevent the incurring of damages, in an action for such damages as he has suffered, he may recover whatever outlay he was put to, whether successful or not, in so far as the efforts made might reasonably be expected to remedy the evil.⁵⁹ But he cannot recover for damages to his horses occasioned by their drinking water polluted by a gas company,

55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388 (a yard for cattle traffic which was a nuisance to neighbors); Metropolitan Asylum District Managers v. Hill, 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664 (a water right); Parry v. Croydon Gas Co., 15 C. B. (N. S.) 568; 11 C. B. (N. S.) 578; 10 Jur. (N. S.) 172; 9 L. T. (N. S.) 994; 12 W. R. 212 (penalty); Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Bohan v. Port Jarvis Gas Co., 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711; Rosenheimer v. Standard Gaslight Co., 36 N. Y. App. Div. 1; 55 N. Y. Supp.

192; People v. N. Y. Gaslight Co., 64 Barb. 55; 6 Lans. 467; Watson v. Gas Co., 5 U. P. Q. B. (Can.) 262; Bohan v. Port Jarvis Gaslight Co., 45 Hun 257; Batchelder v. Tunbridge, etc., Co., 84 L. T. 765; 65 J. P. 680.

⁵⁶ Bohan v. Port Jarvis Gaslight Co., 45 Hun 257.

⁵⁷ Terre Haute Gas Co. v. Teel, 20 Ind. 131.

⁵⁸ Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

⁵⁹ Sherman v. Fall River Iron Works, 2 Allen 524; 79 Am. Dec. 799. See Ottawa Gaslight and Coke Co. v. Graham, 28 Ill. 73.

if he permit them to drink the water after he knows of its pollution.⁶⁰

§593. Evidence.

Evidence on the part of the gas company is not admissible to show that it has so improved its works that they no longer are a nuisance, where the improvement is made after the suit, unless it is sought to recover damages claimed to have been incurred after such improvement was made, and then, of course, only in rebuttal of the claim that damages were incurred during that period. In other words, if the defendant admit that the damages were incurred, then the evidence is not admissible, for, as we have seen, the operation of gas works in a city is a nuisance if they cause a special injury.⁶¹ And the claim that they were not a nuisance at the time the injury was rendered, because of improvements introduced, is not admissible in evidence as a defense.⁶² If the action is to recover damages because of the contamination of a well, testimony concerning the condition of water in wells on other premises in the neighborhood is admissible, in order to show the extent and character of the injury sustained by the plaintiff, and also as tending to show that the operation of the gas plant could produce the injury of which complaint is made.⁶³ On the part of the defense it may be shown that other substances contaminated the well other than those coming from the gas works, in order to reduce the damages; for the plaintiff cannot recover for injuries inflicted by others, although they were incurred at the same time the injuries were inflicted by the defendant.⁶⁴

§594. Injunction.

An action for an injunction lies to prevent the continuance of

⁶⁰ *Sherman v. Fall River Iron Works*, 2 Allen 524; 79 Am. Dec. 799.

⁶¹ *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297.

⁶² *Watson v. Gas Co.*, 5 U. P. Q. B. (Can.) 262.

⁶³ *Belvidere Gaslight and Fuel Co. v. Jackson*, 81 Ill. App. 424; *Ottawa Gaslight and Coke Co. v. Graham*, 35 Ill. 346.

⁶⁴ *Sherman v. Fall River Iron Works Co.*, 5 Allen 213.

a nuisance caused by the operation of gas works,⁶⁵ usually against the manner in which they are being conducted and not generally against their operation.⁶⁶ And if necessary to afford full relief the court may issue a mandatory injunction.⁶⁷ But it must be borne in mind that an injunction will not be granted where the alleged injury is trifling and transient.⁶⁸ Thus, where it appeared, owing to the company's precautions, that only on three occasions had an appreciable escape of gas taken place, and then only from accidental defects which were immediately remedied, an injunction was refused, without prejudice to bring an action at law to recover the damages sustained.⁶⁹ Any one seeking to restrain an alleged future nuisance must make a strong case of probability, that the apprehended mischief will in fact arise.⁷⁰ Of course, an actual befouling of a stream may be enjoined in a proper case,⁷¹ especially where the damages would be inadequate.⁷² If the contaminated water will be deprived of its noxious qualities before it reaches the land of the plaintiff an injunction will be denied.⁷³

⁶⁵ *Imperial Gaslight Co. v. Broadbent*, 7 H. L. Cas. 600; 29 L. J. Ch. 377; 5 Jur. (N. S.) 1319; 7 De Gex MacN. and G. 436; 5 Gas J. 342; 9 Gas J. 751; *Manhattan Gaslight Co. v. Barker*, 7 Robt. (N. Y.) 523; *Tenant v. Goldwin*, 1 Salk. 21, 360; 2 Ld. Raym. 1089; *New Orleans v. Gaslight Co.*, 5 La. Ann. 439.

⁶⁶ *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201; *Wragg v. Commercial Gas Co.*, 33 Gas J. 119, 313; *Attorney General v. Gaslight and Coke Co.*, 7 Ch. Div. 217; 30 Gas J. 791, 827; *Butt v. Imperial Gaslight Co.*, L. R. 2 Ch. 158; 14 L. T. Rep. 349; 15 Gas J. 139.

⁶⁷ *Hendrie v. Lea Bridge, etc., Co.*, 21 Gas J. 949, 989.

⁶⁸ *Attorney General v. Cambridge, etc., Co.*, L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145.

⁶⁹ *Cooke v. Forbes*, L. R. 5 Eq.

166; 37 L. J. Ch. 178; 17 L. T. (N. S.) 371.

⁷⁰ *Attorney General v. Manchester Corporation* [1893], 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343; 3 R. 427. See *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532.

Where a prescriptive right to be foul a stream has been acquired, the fouling must not be enlarged to the prejudice of others. *Crossley v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. (N. S.) 638; 15 W. R. 801; *Baxendale v. McMurray*, L. R. 2 Ch. 790; 16 W. R. 32.

⁷¹ *Clowes v. Staffordshire W. W. Co.*, L. R. 8 Ch. 125; 42 L. J. Ch. 107; 27 L. T. 521; 21 W. R. 32.

⁷² *Pennington v. Brinsop Coal Co.*, 5 Ch. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

⁷³ *Elmhirst v. Spencer*, 2 MacN. &

§595. Enjoining erection of gas plant.

An action will not lie to enjoin the erection of gas works near a dwelling, on the theory that the reservoirs to contain the gas are liable to explode and injure such house and those residing in it. It is the manner in which the gas works will be conducted that must be shown in order to obtain an injunction; for it is a matter of notoriety that gas works can be so conducted as to not seriously annoy those in the neighborhood, although persons sensitive to the odors necessarily escaping may object.⁷⁴ Nor will the drilling of a gas or oil well be enjoined, especially when it is doubtful if either gas or oil will be found.⁷⁵

§596. Former recovery a bar.

If the plaintiff has already recovered a judgment for damages because of the deterioration of his real estate by the maintenance of the gas works in its vicinity and for the pollution of the water thereon and rendering it unfit for use, such judgment is a bar to any further prosecution for the same cause, the continuance of the works being the sole basis of the second claim for damages.⁷⁶ But where an action was brought for damages incurred by injury to crops occasioned by the erection and maintenance of gas works, and the noxious vapors and smells created thereby; and the action was referred to an arbitrator to determine the injury, and "what should be done" between the parties; and nearly two years elapsed before he

G. 45; *Wood v. Waud*, 3 Exch. 148; 18 L. J. Exch. 305; 13 L. T. 212; 13 Jur. 742.

An action lies to prevent hot water being poured into a stream; yet if it reaches a natural temperature before entering on the plaintiff's land, there is no damage. *Mason v. Hill*, 3 B. and Ad. 304; 5 B. and Ad. 1.; 2 N. and M. 747; 2 L. J. K. B. 118.

⁷⁴ *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201.

⁷⁵ *Windfall Mfg. Co. v. Patterson*,

148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532.

If a gas company becomes a nuisance the nuisance may be abated. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; 19 Sup. Ct. Rep. 77; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Butchers' Union Co. v. Crescent, etc., Co.*, 111 U. S. 746; 4 Sup. Ct. Rep. 652; *Coates v. Mayor*, 7 Cow. 585.

⁷⁶ *Decatur Gaslight and Coke Co. v. Howell*, 92 Ill. 19.

made his award with respect to the damages sustained up to the date of the award; and no evidence was given with respect to prospective damages; an entry was made in regard to the award the same as if it had been a verdict; and subsequently the gas company increased their works and altered their method of manufacture; it was held, on a bill filed by the plaintiff two months after the award, that he was entitled to a perpetual injunction to restrain the further manufacture of gas in a manner injurious to his crops, and that there had been no acquiescence on his part to deprive him of his right to an injunction. The award was treated as equivalent to the verdict of a jury.⁷⁷

§597. Indictment for nuisance.

An indictment for the creation of a nuisance in the conduct of its works lies against a gas company, even though it has been authorized by a special act of the legislature to conduct its works in the town or city where located; and the fact that it has been so authorized is no defense.⁷⁸ But if the company, under such authority, has erected its buildings in the best manner possible, and used the best known methods of making, storing and distributing gas, it will not be liable, although it may be liable to a private person injured by the operation of the works in the manner described.⁷⁹

§598. Waste of natural gas or oil.

In Indiana a statute provides that it shall be unlawful for any one having possession or control of a gas or oil well "to allow or permit the flow of gas or oil from" it "to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two days next after gas or oil shall have been struck in such well;

⁷⁷ *Imperial Gaslight Co. v. Broad-*
bent, 7 H. L. Cas. 600; 29 L. J. Ch.
377; 5 Jur. (N. S.) 1319; 7 De
G. McN. and G. 436; 9 Gas J. 751.

L. T. (N. S.) 694; 12 W. R. 212;
11 C. B. (N. S.) 578; *Rex v. Med-*
ley, 6 C. and P. 292.

⁷⁸ *Parry v. Croydon Gas Co.* 15
C. B. 568; 10 Jur. (N. S.) 172; 9

⁷⁹ *People v. N. Y. Gaslight Co.*
64 Barb. 55; 6 Lans. 467.

and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles." ⁸⁰ It was not only held that this statute was constitutional, but also that the State could maintain an action to restrain the waste of gas in violation of its provisions, where it was alleged that the penalties for the wasting of gas were wholly inadequate, and that the injuries occasioned by the wrongful and unlawful conduct of the defendant, if permitted to continue, would be irreparable. It was considered that permitting gas to escape in violation of the statute was a nuisance. In passing upon the case the court said:

"Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its wells without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden

⁸⁰ Burns' Stat. 1901, Sec. 7510;
Thornton's Rev. Stat. 1897, Sec.
7887.

by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State, and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: 'It is my property to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?' We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action."⁸¹

⁸¹ State v. Ohio Oil Co., 150 Ind. 21; 149 N. E. Rep. 809.

CHAPTER XXIX.

LEAKS AND EXPLOSIONS.

- §599. Duty of gas companies in general.
- §600. Care required of gas companies.
- §601. Gas company must keep its gas constantly under control.
- §602. Degree of care required of gas company.
- §603. Night watchman.
- §604. Gas company's act or neglect must have caused the damage.
- §605. Two or more defendants liable.
- §606. Statute permitting recovery although there is no negligence.
- §607. Explosion occasioned by a violation of a statute.
- §608. Laying gas main in navigable river.
- §609. Overwhelming disaster.
- §610. Burden of proof.
- §611. Presumption of negligence does not arise from proof of explosion.
- §612. Presumption of negligence arising from proof of explosion.
- §613. Stop-cock on street line.
- §614. Intervening agency.
- §615. Inspection of pipes or mains.
- §616. Duty to make repairs immediately.— Available force.
- §617. Notice of leaks.
- §618. Notice.— Failure to discover place of leak.
- §619. Notice of leak, when not necessary to fix liability.
- §620. Evidence of notice to gas company of danger to mains.
- §621. Evidence of other leaks.
- §622. Evidence of leaks.
- §623. Breaks occasioned by ordinary use of streets.
- §624. Action of frost.
- §625. Pipes breaking from lack of support.— Excavations near pipe line.
- §626. Property owner's duty to notify gas company of leaks.
- §627. Company misleading plaintiff as to extent of danger.
- §628. Municipality operating plant.
- §629. Gas following supply pipe from main.— Percolating through soil.— Sewer.
- §630. Withdrawing gas from mains without notice.
- §631. Undue pressure in mains.
- §632. Evidence of undue pressure at other places.
- §633. Explosion caused by act of servant of gas company.

- §634. Company undertaking to repair consumer's pipes or fixtures.
- §635. Injury to shade trees.—Shrubbery.
- §636. Illuminating gas driving sewer gas into house.
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- §649. Owner removing from his premises to avoid injury.
- §650. Duty of property owner to cut off supply of gas.
- §651. Searching for leaks with a light.
- §652. Contributory negligence a question for the jury.
- §653. Negligence of parent, wife or servant.
- §654. Contributory negligence of tenant may bar landlord,—reversionary interest.
- §655. Negligence of contractors.—Lessee.
- §656. Right of action over.
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- §658. Evidence to show due care on gas company's part.
- §659. Expert evidence to show effect of electrolysis.
- §660. Evidence in cases of inhalation of gas.
- §661. Expert evidence on inhalation of gas.
- §662. Proof of effect upon growing vegetation or grass.
- §663. What acts of negligence a question for the jury.

§599. Duty of gas companies in general.

In speaking of the duty of a gas company supplying a city and its inhabitants with gas, the Supreme Court of Massachusetts has used the following language: "The defendants [a gas company], under their charter, were in the enjoyment of a great and peculiar privilege, that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of responsibility in the conduct of their business and in the preservation of every part of their apparatus from defects by which the public might be subjected to great inconvenience, and individuals be exposed to imminent peril

and danger in respect to property and their lives. They are therefore under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and despatch, whatever exigency might occur. It is manifestly impossible that they should have at their service, at every moment and at every point of exposure, an adequate force to overcome a sudden fracture of their pipes, or any other casual and unexpected obstacle in the conduct of their affairs in the shortest possible time. All that they are required to do is to afford ample opportunities to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects, and interruptions in their affairs, as from experience and character of their works there was reasonable ground to anticipate might occur.”¹

§600. Care required of gas companies.

In Massachusetts the following rule was laid down by the Supreme Court, relative to the care required of a gas company furnishing a city and its inhabitants with gas: “It is the duty of gas companies, which are invested, for their own profit and advantage, with the great and important privilege of supplying the community with light for private habitations, and for other places devoted to public or private use, to exercise due care and diligence in keeping the gas constantly under their control and preventing it from escaping into a dwelling house or place of business, where the inmates or occupants are in such cases involuntarily subjected to its effects, whether they are positively

¹ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233.

Where water is used in a meter, the gas company must keep the meter so supplied with water that it will not leak. *Hacker v. London Gaslight Co.*, 32 Gas J. 781.

A gas company cannot contract

against its liability for damages occasioned by an explosion brought about by its negligence. *Bastian v. Keystone Gas Co.*, 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; 4 Am. Neg. Rep. 529; *Deckert v. Municipal, etc., Co.*, 9 N. Y. App. Div. 573; 41 N. Y. Supp. 692.

injurious or merely disgusting and offensive. If its effect is noxious as well as disagreeable, the diligence required to take care of and control it should be still more active and unremitting." ²

§601. Gas company must keep its gas constantly under control.

A gas company operating in the streets of a city or town is bound to constantly keep its gas under control, and prevent it escaping into dwelling houses and places of business; and if the gas does escape and cause damages, the company is usually liable.³ And the fact that the company, in the erection and operation of its plant, took all reasonable and proper precaution, and used the best and most approved machinery and appliances, added all that a prudent person could do to prevent the escape of gas from its plant, of itself does not relieve the company from responsibility, if an injury actually results because of the escaping gas.⁴ Gas is regarded, and is, a dangerous substance; and he who brings it onto his or another's premises must safely keep it at his peril. In this respect it is not unlike the collection of a large body of water upon one's premises; the person so doing does so at his peril and must keep it safely confined. In an Ohio case where a stand-pipe filled with water fell, causing much damage, the court said: "This brings us to the consideration of the question of the liability of one who, for his own purposes, collects upon his premises a substance likely to injure others in case it escapes.

² Emerson v. Lowell Gaslight Co., 3 Allen 410; Parry v. Smith, L. R. 4 C. P. 325; 33 Gas J. 899.

Every precaution suggested by experience and the known dangers must be taken. Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653.

The fact that other causes contributed to the injury does not bar the action, though it may be shown to affect the damages. Sherman v. Fall River, etc., Co., 5 Allen 213.

³ Armbruster v. Auburn Gaslight Co., 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158; Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; Chisholm v. Atlanta Gaslight Co., 57 Ga. 28; Triple, etc., Co. v. Wellman (Ky.), 70 S. W. Rep. 49; So. Oil, Langa-bough v. Anderson, 22 Ohio Cir. Ct. Rep. 178; 12 Ohio C. D. 341.

⁴ Belvidere Gaslight Co. v. Jackson, 81 Ill. App. 424.

“ The principle upon which liability rests in such case is quite unlike that which determines the liability of one who leaves unguarded, excavations upon his own lands, or one who negligently constructs a building so that it falls upon his own premises. In these latter cases no one can be injured unless he comes upon the premises. If he remains away, he is safe. In the former, the danger arises from the natural tendency of the things to escape from the premises where stored, together with the likelihood of its doing injury if it does escape therefrom. In England it seems to be settled by *Fletcher vs. Rylands*,** inanimate substances or animate things from the escape of which injury is likely to follow, to prevent such escape. While this duty may not extend to trespassers, or those who, for their own purposes, without express or implied invitation from the proprietor, chose to come upon the premises, yet that case (*Fletcher vs. Rylands, supra*), should be regarded as extending this duty to all persons who may be rightfully on adjoining premises. Blackburn, J., in the course of an able opinion, and speaking for the whole court, used the following language: ‘ We think the true rule of law is that the person, who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage that is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to plaintiff’s default; or, perhaps, that the escape was the consequence of a *vis major*, or the act of God. . . . The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor’s reservoir, or whose cellar is invaded by the filth of his neighbor’s privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor’s alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long

**L. R. 1 Exch.

as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief may accrue, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought, be beasts, or water, or filth, or stench.

"This doctrine," resumes the Ohio court, "would seem to be in exact accord justice and sound reason; but in the case before us we are not required to apply it to its full extent, because the defendant in error, in her amended petition, expressly avers negligence in the construction of the stand-pipe, as well as knowledge that it had afterward cracked and become weakened, a negligent failure to make repairs, and that the accident which caused her injuries was the direct result of such negligence."

"Therefore, whether or not she could recover in the absence of negligence on the part of the water company in storing the water, does not concern us at this time, for, however that may be, certainly one who, like defendant in error, is rightfully on premises adjoining those upon which such substances are stored, and is injured by their escape, should, upon the plainest principles of natural justice, recover from the proprietor storing the same, damages for such injury, where the escape was caused by negligence."

"While every person has exclusive dominion over his own property, and may subject it to such uses as may subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights."

"The maxim '*sic utere tuo ut alienum non laedas*' limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood." "The reports are filled with cases where this doctrine has been applied,

and it may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character.”⁵

§602. Degree of care required of gas company.

The decisions are not uniform with respect to the degree of care required of a gas company to prevent leaks and explosions. In many cases it is said that the company must use due care to prevent an injury to person or property, no other qualifications of the degree of care being used.⁶ And after notice of a leak it is said it must use “reasonable diligence” to discover and stop it, which is an elastic phrase; and it may be remarked no one would expect it to use “unreasonable degree of diligence.”⁷ In a Pennsylvania case the degree of care required was stated as follows: “The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe

⁵ *Defiance Water Co. v. Olinger*, 54 Ohio St. 532; 44 N. E. Rep. 238; 32 L. R. A. 736; 35 Ohio L. J. 323, 350.

The court cites *St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co.*, 14 Ohio Cir. Ct. Rep. 522; *Bohan v. Gaslight Co.*, 122 N. Y. 18; 9 L. R. A. 711; 34 Am. and Eng. Corp. Cas. 57; and *Brady v. Detroit Street, etc., Co.*, 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175.

This is the doctrine of the case of *Rylands v. Fletcher*, L. R. 3, H. L. 330, which has been held in Pennsylvania not to be applicable to a gas company. *Strawbridge v. Philadelphia*, 13 Phila. 173; 13 Repr. 216; 36 Leg. Int. 276.

In Kentucky it is held that a natural gas company is not an insurer of the safety of its product, so as to be responsible for a failure to keep it confined. It is only liable for a failure to exercise ordinary care. *Triple State, etc., Co. v. Wellman (Ky.)*, 70 S. W. Rep. 49.

⁶ *Pine Bluff, etc., Co. v. McCain*, 62 Ark. 118; 34 S. W. Rep. 549; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Triple State, etc., Co. v. Wellman (Ky.)*, 70 S. W. Rep. 49; 24 Ky. Law Rep. 851.

⁷ *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; *Hunt v. Lowell Gaslight Co.*, 1 Allen 343; *Blenkiron v. Great Central Gas, etc., Co.*, 2 F. and F. 437; 2 Gas J. 292, 776; 3 L. T. (N. S.) 317.

to say, in general terms, that every reasonable precaution suggested by the experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. It requires nothing unreasonable; it does not require that the company shall keep up a constant inspection all along its lines without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas.”⁸ But in an Indiana case, in speaking of the duty of a natural gas company, the court said: “Appellant was engaged in dealing in and furnishing to its patrons a dangerous, deadly explosive, and inflammable element. The character of the product it furnished required of it the highest degree of care and caution, and imposed upon it a continuing duty of oversight and inspection.”⁹ These several expressions may be all reconciled, probably, by the well known rule in negligence cases that due care in a particular instance depends upon the existing danger — the care required increasing with increase of the danger. Or, as it has been stated, in a particular application, a gas company is bound to exercise a reasonable degree of care commensurate with the dangerous and explosive nature of its commodity.¹⁰ This is the

⁸ *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653. “Something like this was said in *Kiebele v. Philadelphia*, 105 Pa. St. 41, and in *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233; and *Smith v. Boston Gaslight Co.*, 129 Mass. 318; and this principle is recognized in many kindred cases.”

⁹ *Indiana, etc., Gas Co. v. Long*, 27 Ind. App. 219; 59 N. E. Rep. 410; *Alton Ry., etc., Co. v. Foulds*, 81 Ill. App. 322; affirmed 190 Ill. 367; 60 N. E. Rep. 53; (electricity); *Bastian v. Keystone Gas Co.*, 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537.

¹⁰ This was said with reference to the duty of a gas company in keeping its meters in a condition

rule laid down in many cases.¹¹ It must be borne in mind that a gas company is a quasi-public corporation, in cities and towns dealing with the public, and having the right to lay its pipes in the public streets. Hence there devolves upon it a duty to use a greater degree of care than if it was merely a private corporation, especially if the latter is remote from contact with the public. It is handling a dangerous substance — probably more dangerous than gunpowder — often in the midst of heavily populated districts; and such a situation calls for a high degree of care. “Care and diligence,” said the Supreme Court of Massachusetts, “should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstance under which they are to be exercised. But it must be equal to the occasion on which it is to be used, and is always to be judged of according to the subject matter, the force and danger of the material under the defendant’s charge and the circumstances of the case.”¹²

§603. Night watchman.

It is the duty of a gas company to keep watch not only in the day time over its plant and the supply of gas, but also at night; especially where the pressure of the gas in the mains fluctuates, as in the case of natural gas. “A person or corporation who furnishes natural gas to customers and negligently causes, suffers or permits the pressure to increase beyond the usual and

free from menace of danger to the persons or property of others. *Anderson v. Standard Gaslight Co.*, 17 N. Y. Misc. 625; 40 N. Y. Supp. 671.

¹¹ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Rockford Gaslight, etc., Co. v. Ernst*, 68 Ill. App. 300 (must exercise care in the use of gas in proportion to the danger); *Belvidere Gaslight and Fuel Co. v. Jackson*, 81 Ill. App. 424; *Chisholm v. Atlanta Gaslight Co.*, 57 Ga. 28; *Armbruster v. Auburn*, 18 N. Y.

App. Div. 447; 46 N. Y. Supp. 158; *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

¹² *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233; *Holding v. Liverpool Gas Co.*, 3 C. B. 1; 10 Jur. 883; 15 L. J. C. P. 301; 5 N. Y. Leg. Obs. 77; *Anthon N. P.* 356, note; *Koelsch v. Philadelphia Co.*, *supra*; *Mississinewa Mining Co. v. Patton*, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203.

accustomed pressure to the extent that it overheats stoves, etc., of its customers, and without the latter's fault, so that damage results to the customers, such act is a positive wrong, and is therefore actionable. In a case of this character it is not sufficient to relieve the gas company from liability for it to show that its regulators, etc., were in good repair and working order; but it must go further and show that it had maintained an efficient system of inspection; that it provided a watchman or competent servant to control the pressure, etc.¹³ Especially is it necessary for this to be done during the night, for it has become a matter of common knowledge that during the night, while many fires are either turned out or down, that receive their supply of fuel from the same main, the pressure is increased."¹⁴

§604. Gas company's act or neglect must have caused the damage.

It is an elementary proposition that the act of the gas company, or its neglect to perform a duty, must cause the damages, to make it liable. The damages must be directly traceable to the act of the gas company; or they must be directly traceable to its failure to perform a duty, the word "duty" in this connection implying that the company is under an obligation to perform the thing, which, omitting to perform caused the injury. In an Indiana case is furnished an illustration of this statement. A complaint in an action against a natural gas company to recover damages to the plaintiff, caused by an overheated stove, contained the allegations that the plaintiff had control of all gas appliances within her home, except the mixer, that the defendant, over her protest, substituted a number seven for a number five mixer, but there was no allegation that the defendant was bound to furnish such a mixer as the consumer desired, or that the fire might not have occurred with either mixer; that a valve was placed in the pipe to regulate the

¹³ Citing *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. 653; 18 L. R. A. 759. Ind. App. 219; 59 N. E. Rep. 410; *Indiana, etc., Gas Co. v. New Hampshire, etc., Co.*, 23 Ind. App. 298; 53 N. E. Rep. 485.

¹⁴ *Indiana, etc., Co. v. Long*, 27

flow of gas, but that the amount of the flow depended entirely upon the pressure, which was regulated by the company; that the "valve was used to turn off and put on the gas," and that "she had carefully adjusted the valve to suit the pressure before her absence." It was held that the complaint failed to show any negligence on the part of the defendant, and also failed to show that the plaintiff was free from fault. In passing on the case the court said: "In the case at bar the complaint fails to make a case within the above rule. Construing the pleading most strongly against the pleader we can but conclude that it fails to show any negligence on the appellee's part, and also fails to show appellant free from fault. It appears that appellant had control of all gas appliances within her home except the mixer. Complaint is made that appellee changed, over appellant's protest, a number five for a number seven mixer, but there is nothing to show that appellee was legally bound to furnish such mixer as the consumer wished. So far as we are informed by the complaint, the fire might have occurred with either mixer. It is not shown where the right to determine the size of the mixer lay. Appellee may have had the right under franchise to require a certain mixer for such a house as appellant's; it may have had a perfect right to change the mixer as it did. It is not claimed the mixer put in was defective, or that any of the appliances were defective. It is not shown that the change was a negligent act, or that appellee did anything wrongful in making the change, or that after the change was made it negligently increased the pressure through such changed mixer. It is averred that the gas passes out of the pipe through mixer into an instrument called a burner, and in the pipe before the point where the gas passes through the mixer, 'is placed a valve which is opened and closed to regulate the flow of the gas, but the amount of the flow of gas depends upon the pressure entirely,' and that the pressure is regulated by the company. It is also averred that the 'valve is used to turn off and put on the gas.' Construing these averments together they mean that the flow of gas, whether the pressure was great or small, was controlled by this valve. And it seems ap-

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and danger in respect to property and their lives. They are therefore under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and despatch, whatever exigency might occur. It is manifestly impossible that they should have at their service, at every moment and at every point of exposure, an adequate force to overcome a sudden fracture of their pipes, or any other casual and unexpected obstacle in the conduct of their affairs in the shortest possible time. All that they are required to do is to afford ample opportunities to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects, and interruptions in their affairs, as from experience and character of their works there was reasonable ground to anticipate might occur.”¹

§600. Care required of gas companies.

In Massachusetts the following rule was laid down by the Supreme Court, relative to the care required of a gas company furnishing a city and its inhabitants with gas: “It is the duty of gas companies, which are invested, for their own profit and advantage, with the great and important privilege of supplying the community with light for private habitations, and for other places devoted to public or private use, to exercise due care and diligence in keeping the gas constantly under their control and preventing it from escaping into a dwelling house or place of business, where the inmates or occupants are in such cases involuntarily subjected to its effects, whether they are positively

¹ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233.

Where water is used in a meter, the gas company must keep the meter so supplied with water that it will not leak. *Hacker v. London Gaslight Co.*, 32 Gas J. 781.

A gas company cannot contract

against its liability for damages occasioned by an explosion brought about by its negligence. *Bastian v. Keysone Gas Co.*, 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; 4 Am. Neg. Rep. 529; *Deckert v. Municipal, etc., Co.*, 9 N. Y. App. Div. 573; 41 N. Y. Supp. 692.

sions of one company touching the cause of the accident are not admissible in behalf of its co-defendant; and counsel for one company cannot comment in argument or admissions made by the employees of the other defendant touching its responsibility for the accident, unless it has been shown that such employees were authorized to make such admissions. In such an instance, the one defendant is not entitled to the benefit of an instruction, given with plaintiff's consent, which is unduly favorable to its co-defendant, the rulings as to the one defendant being correct in themselves; and that admission of a servant of one of the defendants, made after verdict rendered at the close of the plaintiff's evidence in favor of his employer, touching the cause of the accident, is not admissible in favor of the co-defendant company, since the defendant making the admissions is no longer a party to the controversy.¹⁹ In the case just cited it was held that one gas company was liable, even though only a part of the gas that exploded was its own. So if one carelessly and negligently applies a light to escaping gas he will be liable equally with the gas company that negligently permitted it to escape.²⁰ Where gas wells were drilled by a subcontractor, the pipes being furnished by the contractor and put together by the subcontractor; and after the subcontractor had ceased to use the pipes and gas for drilling purposes, the agents of the contractor took up the north and south line, which connected with the east and west line, leaving one joint connected with the T, after which the accident happened, the pipe line then being solely the property of the contractor; the latter was held liable because he had assumed the subcontractor's former charge to care for the line, which, after the accident, was used as a part of the permanent line. And where, before the accident, gas was delivered to the company by the contractor, partly through the pipe line in question, the company, as well as the

¹⁹ *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183; *Schermerhorn v. Metropolitan Gaslight Co.*, 5 Daly 144; *Burrows v. March Gas and Coke Co.*, L. R. 5 Exch. 67; 22 L. T. (N. S.) 24.

²⁰ *Pine Bluff, etc., Co. v. McCain*, 62 Ark. 118; 34 S. W. Rep. 549; see *Flint v. Gloucester Gaslight Co.*, 3 Allen 343.

contractor, was held liable, notwithstanding the fact that he had not, at the time of the accident, fully completed his contract, nor formally turned over the plant to the company which was in actual use, for the escape of gas which flowed through the pipe in question.²¹ Where a contractor laying gas mains in a street joined them imperfectly, and the gas company turned on the gas before the works had been turned over to it, to test the pipes, and the gas escaped at the imperfect joints, injuring a workman; it was held that both the gas company and the contractor were jointly liable — the contractor, because he had done imperfect work; and the gas company, because it was its duty to see that the pipes were in a proper condition before turning gas into them.²² A somewhat similar decision was made in case of escaping oil catching fire. In this instance an oil pipe was connected with an oil car. The oil escaping from the pipe caught fire, and in order to save the car by pushing it along from the track it became necessary to disconnect it from the pipe. A servant went upon the car by direction of another servant to turn the valve in it in order to cut off the flow of the oil into the pipe, and upon being advised and assured that the oil had been cut off, the injured servant disconnected the pipe from the car, whereupon the oil, by reason of the fact that it had not been cut off, poured over him, igniting and burning him severely. There were no stop-cocks in the pipe, so the oil could be cut off in case of danger, having been removed without notice to the servant sustaining the injuries. The court considered that it took the combined negligence of the master and the servant who was directed to cut off the flow of the oil to produce the injury, and that the master was liable.²³

²¹ *Lebanon Light, etc., Co. v. Leap*, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342.

A mining company cannot escape by simply placing the management of its mining in charge of a person under a written contract, in which such person is called a "lessee." *Consolidated Coal Co. v. Seninger*, 79 Ill. App. 456; affirmed 179 Ill. 370; 53 N. E. Rep. 733.

²² *Chicago Economic Fuel Co. v. Myers*, 168 Ill. 139; 48 N. E. Rep. 66; affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276.

²³ *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215, affirming 41 Ill. App. 34.

The action may be brought against the person operating a plant, although another person built

§606. Statute permitting recovery although there is no negligence.

A statute may be so drawn as to render a gas company liable for damages occasioned by an explosion, although there is no negligence on the part of the defendant. Thus in Ohio a statute with reference to a natural gas company provided that it "shall be liable for any damages that may result from the transportation of" natural gas. It was held that a natural gas company transporting natural gas was liable for an explosion, under this statute, although not guilty of any negligence causing the explosion, the court saying: "Upon principles of universal application, the company would be held liable for any damages that might result from its negligence in transporting natural gas through the streets of a city. Therefore, to construe the statute as the plaintiff in error contends would deny it any operation or effect whatever. We think that when the subtle and dangerous properties of this fluid are considered, together with the long existing, and perhaps still unsettled, controversy that has claimed the attention of courts and textwriters, both in England and in this country, respecting the extent of the liability of those who deal in dangerous substances, for damages caused by them, and the absence of the word 'negligent,' in the Act declaring the liability of the plaintiff in error has great significance, and can only be reconciled with a legislative purpose to impose upon the company the duty of absolutely controlling this substance when it should introduce it into places where, if it escaped control, it would menace the lives and property of others, who had no control over it, and were without fault themselves contributing to injury."²⁴

it, where the action is based on a defective construction of such plant. Hyde Park, etc., Co. v. Porter, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152.

²⁴ Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695; 35 N. E. Rep. 1059; 29 L. R. A. 337. See Belvidere Gaslight Co. v. Jackson, 81 Ill. App. 424.

§607. Explosion occasioned by a violation of a statute.

A gas company may be liable for an injury occasioned by a violation of a statute prescribing regulations to be observed by it. Such was held to be the case where a company failed to test its pipes to a pressure of four hundred pounds to the square inch, as a statute required, and which forbade it to use a pressure of over three hundred pounds in conveying gas. The gas escaped because the pipes did not come up to the test prescribed.²⁵ And where the injury was occasioned by gas escaping from a pipe laid by the company on the surface of the highway, the company was held liable, although the particular injury could not have been foreseen.²⁶ And where a gas company unlawfully laid its pipe line in a highway, from which gas escaped and entered a defective water pipe of the plaintiff and polluted the water in his well, the company was held liable, and it could not escape liability by showing the defect in the water pipe. "Where a company," said the court, "chooses for its profit to bring a gas pipe upon the land, they must keep it there at its own peril." It is no answer to say, "Your pipe is bad, and the gas for that reason got into it."²⁷

§608. Laying gas main in navigable river.

It is an illegal act to lay a gas main on the bottom of a navigable river, without sinking it beneath the soil of the bottom; and the company will be liable for all the consequences of its act in so illegally laying its pipe. Thus, where a gas company had so laid its pipe on the bottom of a river, and a boat ran against it, breaking it, whereby gas escaped and, igniting

²⁵ Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

²⁶ Indiana Natural, etc., Co. v. McMath, 26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287. Lebanon, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342.

²⁷ Batcheller v. Tunbridge Wells

Gas Co., 84 L. T. 765; 65 J. P. 680.

A tenant carrying on a livery stable without taking out a license required by an ordinance or a statute, cannot recover damages occasioned by the escape of gas, even though he might sustain an action for a nuisance to real estate. Sherman v. Fall River Iron Works Co., 5 Allen 213.

from the furnace of the boat, set the boat on fire, it was held that the gas company was liable for its destruction.²⁸ But where the trailing anchor of a vessel caught and injured a gas pipe laid upon the bed of a navigable river, it was held that if the captain of the vessel, upon striking the pipe could, with proper care and reasonable precaution, have then prevented the injury, the owners of the vessel would be liable for all injury which could thus have been prevented.²⁹

§609. Overwhelming disaster.

Where an overwhelming disaster falls upon a gas company's works, its efforts to prevent injuries to the public must be measured by the extent of the disaster. An illustration is afforded by the great fire in the city of Boston, November 9, 1872. A gas company's mains were broken, by the falling buildings, causing many leaks; the gas escaped throughout the burnt district, causing frequent explosions; and it escaped into cesspools and sewers in dangerous quantities. Notwithstanding these facts, the gas company on the subsequent day and night continued to manufacture gas in large quantities; and on the morning of that day the company was notified by a porter of a building that gas was escaping, and especially from the next adjoining building. The company had many valve boxes in the vicinity which were not closed, but there was no evidence that the fire, which burnt the building, for which the suit was brought and of which its porter had given notice of the leak, was caused by the leak of which the company was notified in the morning, or that by shutting the valves in the vicinity the escape of gas would have been stopped, or that it was practically possible to get at the valves for that purpose. It was held that there was no evidence of negligence, and on the evidence the jury was not warranted in finding for the plaintiff. The court

²⁸ *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354; 18 Pittsb. L. J. (N. S.) 4.

²⁹ *Milwaukee Gaslight Co. v. Schooner Gamecock*, 23 Wis. 144.

This is manifestly correct, for no man can excuse his own negligence by the negligent or illegal act of another.

did not consider it was the duty of the gas company to shut off the gas from the entire city, for that would probably have brought a train of disasters to the inhabitants and caused great inconvenience, by depriving the city of light and furnishing an opportunity for thieves and thugs. While the danger was great, requiring of the company great vigilance and great efforts to prevent injuries to persons and property, yet the burden devolved upon the plaintiff to show that it had not done all it could do and that it could have prevented the explosion and consequent fire. In this instance, it was not sufficient to show an escape of gas, an explosion and a resultant damage, for negligence could not be inferred from proof of these facts alone. Something more was required.³⁰

§610. Burden of proof.

The plaintiff necessarily must sustain the allegations of his complaint or declaration; and this, of course, casts upon him the burden to prove that the defendant was guilty of the acts of negligence charged therein. In this respect, cases of injuries or damages inflicted by gas leaks or explosions do not differ from other cases of negligence. Facts must be alleged and shown affirmatively by the plaintiff that the defendant gas company by its own act or by its omission has violated some duty incumbent upon it which has caused the injury of which complaint is made.³¹ If the charge be that the defendant gas company failed to discharge its duty in keeping its mains in a sound and safe condition for transmitting gas, the burden rests upon it to show

³⁰ *Hutchinson v. Boston Gaslight Co.*, 122 Mass. 219. See *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. Rep. 653; 18 L. R. A. 759; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 33 Atl. Rep. 423; *State v. Consolidated Gas Co.*, 85 Md. 637; 37 Atl. Rep. 263.

³¹ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233;

Smith v. Boston Gaslight Co., 129 Mass. 318; *Washington Gaslight Co. v. Eckloff*, 22 Wash. L. Rep. 656; *McGahan v. Indianapolis, etc., Gas Co.*, 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355; 49 Am. St. Rep. 199; *Hutchinson v. Boston Gaslight Co.*, 122 Mass. 219; *Strawbridge v. Philadelphia*, 13 Phila. 173; 36 Leg. Int. 276; 2 Penny. 419; 13 Rep. 216.

that fact in order to recover.³² Where the owner of a house dug a tunnel from his cellar, under the street pavement, to a sewer, and an employee of the city searching for a leak in front of the house, not knowing that there was a tunnel there, lighted a paper, and moved it along the surface of the sidewalk, that being the usual method of discovering leaks, and ignited a jet of escaping gas, which he extinguished by covering it with dirt; and five minutes after an explosion occurred in the cellar, it was held that the city was not liable.³³ And where the evidence showed that an employee of a gas company went into the cellar with a candle to fix the pipes; that soon after gas began to escape in large quantities, and some workmen went into the cellar to rescue the employee, who had become unconscious; that as they were about to pick him up "a big flash of fire came around us, and scattered all over the floor," as one of the witnesses testified; and there was no evidence that the employee had lighted the candle, or had any other light with him; nor any evidence as to the cause of the explosion, it was held that no negligence on the part of the gas company was shown.³⁴

§611. Presumption of negligence does not arise from proof of explosion.

What will be sufficient proof to make a *prima facie* case of negligence must depend on the particulars of each particular case. Courts judicially know that both illuminating and natural gas is highly explosive and combustible, and that it will explode when ignited by fire.³⁵ The courts will also take judi-

³² *Holly v. Boston Gaslight Co.*, *supra*; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

³³ *Littman v. New York City*, 30 N. Y. App. Div. 189; 55 N. Y. Supp. 383; affirmed 159 N. Y. 559; 54 N. E. Rep. 1093.

³⁴ *Schaum v. Equitable Gaslight Co.*, 15 N. Y. App. Div. 74; 44 N. Y. Supp. 284.

³⁵ *Alexander Mining, etc., Co. v. Irish*, 16 Ind. App. 534; 44 N. E. Rep. 680; *Brown v. Spillman*, 155 U. S. 665; 15 Sup. Ct. Rep. 245; *Fuchs v. St. Louis*, 133 Mo. 168; 31 S. W. Rep. 115; 34 S. W. Rep. 508; 34 L. R. A. 118 (gases from petroleum).

But it will not take judicial notice that dry, fine coal dust is a dangerous and explosive element. *Cherokee, etc., Co. v. Wilson*, 47 Kan. 460; 28 Pac. Rep. 178.

cial notice that gas will not explode unless caused by some outside agency, as the introduction of fire or an electric spark; and also that it can be confined in pipes and safely conducted through the streets to the consumer. In addition to this is the rule that gas companies distributing gas must exercise vigilance to prevent injury to persons while remaining on the premises where manufactured, or while being carried through its own pipes to its consumers,³⁶ and the vigilance required is of a much higher degree where the pipes are laid in the streets of a densely populated city than where laid in the country.³⁷ But notwithstanding these facts, proof of the explosion and the resulting injury will not establish the liability of the gas company. It must not be forgotten that the cause of action is founded upon the negligence of the defendant, and that negligence must be shown before there can be a recovery. Thus, where it was shown that an explosion occurred in an oil refinery, followed by a fire; that the burning oil ran down a pipe used by the oil company to pump oil into the refinery from vessels lying at the wharf, and entered a lighter filled with oil, which exploded, communicating the fire to the plaintiff's vessel about twenty feet distant, the fire being occasioned by the explosion of a boiler, called an "agitator," used in the refinery; but there was no evidence to show that it was not a proper boiler, such as was generally in use, or that the explosion was occasioned by an improper use of it, or that it was defective. On this evidence the court held that the defendant oil company was not liable, as it was only liable for its negligence, the mere fact of an explosion not raising a presumption of negligence. The court was careful to call attention to the fact that there was no contractual relation between the plaintiff and defendant — as there is, for instance, between a passenger and the railway company carrying him — and quoted an established work on negligence, where it is said: "It is believed that it is never true, except in contractual relations, that the proof of the mere fact that the acci-

³⁶ *Tiehr v. Consolidated Gas Co.*,
51 N. Y. App. Div. 446; 65 N. Y.
Supp. 10.

³⁷ *Mississienawa Mining Co. v.*
Patton, 129 Ind. 472; 28 N. E. Rep.
1113; 28 Am. St. Rep. 203.

dent happened to the plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant.”³⁸

“ We are of the opinion that the evidence presented by the plaintiffs failed to establish a cause of action against the defendant, and consequently that the trial court erred in denying the motion to dismiss the complaint made after plaintiffs had rested their case. The fact that the injury sustained by the plaintiffs may have been a direct result of the fire which originated upon the premises of the defendant does not of itself render it liable to respond in damages therefor. The defendant was not maintaining a nuisance. Its business was lawful, and, in its conduct, the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident, but rather burdens it simply with the duty of using reasonable care and caution to save others from injury. If it omitted that duty, and failed to observe that ordinary care which was incumbent upon it, then, because of such neglect, it became legally chargeable with the damages directly resulting therefrom, but not otherwise. As the existence of negligence is an affirmative fact to be established by him who alleges it as a foundation of his right of recovery, it was incumbent upon the plaintiffs to point out, by evidence, the defendant’s fault, for the presumption is, until the contrary appears, that every man has performed his duty. This rule has been frequently applied in cases where a fire has spread over and upon the lands of an adjoining owner to his damage. It has likewise been enforced against persons seeking to recover for damages sustained by fires originating from locomotives in operation upon railroads. But the plaintiffs insist that, while negligence cannot be inferred from the fact that the fire originated upon the premises of the defendant, it may be presumed from the proof of an explosion. It is difficult to discover a reason for holding that proof of the occurrence of a destructive fire in defendant’s premises does not raise a presumption of negligence, while proof of the mere fact of an explosion does. It has been said that there is a general disposition among men

³⁸ 2 Thomp. Neg. Sec. 1227.

to preserve their property, and escape liability, and that ordinarily these motives will secure that degree of care and caution which the safety of the public demands, and hence the presumption of duty performed, which in cases of fire will protect him until the facts be proven from which negligence can be inferred. For precisely the same reason he is entitled to the benefit of such presumption in the case of an explosion, where no contractual relation exists; and the plaintiffs must go one step further, and prove the facts from which it can be legitimately inferred that either in construction, repair, or operation, he omitted that reasonable care and caution which he should have observed.”³⁹

³⁹ *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 25 N. E. Rep. 259, reversing 55 N. Y. Super. Ct. Rep. 384. To support its conclusion the court cited *Walker v. Chicago, etc., R. R. Co.*, 71 Ia. 658; 33 N. W. Rep. 224 (an explosion of dynamite); *Huff v. Austin*, 46 Ohio St. 386; 21 N. E. Rep. 864 (an explosion of a steam boiler); *Young v. Bransford*, 12 Lea. 232 (an explosion of a steam boiler); and refused to follow *Rose v. Stephens, etc., Transportation Co.*, 11 Fed. Rep. 438; 20 Blatchf. 411. Followed in *Reiss v. Steam Co.*, 128 N. Y. 103; 28 N. E. Rep. 24; *Loeber v. Roberts*, 17 N. Y. Supp. 378; *Babcock v. Fitchburg R. R. Co.*, 140 N. Y. 308; 35 N. E. Rep. 596; *Losee v. Buchanan*, 51 N. Y. 476 (steam boiler exploding); *Morris v. Southworth*, 154 Ill. 118; 39 N. E. Rep. 1099; *Marshall v. Welwood*, 38 N. J. L. 339; *Washington Gaslight Co. v. Eckloff*, 4 App. D. C. 174 (error to charge the injury that an unusual explosion on the premises was *prima facie* evidence of negligence); *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Sup. 426.

The mere fact that a building was

set on fire from gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

Mere ownership of gas in the pipes does not, of itself, render the owner liable for injuries caused by escaping gas, if the company is in no manner guilty of negligence. *People's Gaslight Co. v. Amphlett*, 93 Ill. App. 194.

The explosion of a hot-water radiator in a room in a railroad hotel does not raise a presumption of negligence on the part of the lessor, who had charge of the apparatus, toward a waiting passenger. *Kirby v. Delaware, etc., R. R. Co.*, 20 N. Y. App. Div. 473; 46 N. Y. Supp. 777.

A jury may find negligence from the breaking of a gas main and the consequent escape of gas; but it is for the jurors to say whether they will do so, and, if there are other circumstances bearing on the question, they must weigh them all. Instructions that evidence “is sufficient to show,” or “has a tendency to show,” or is “enough to show”

§612. Presumption of negligence arising from proof of explosion.

Not in all jurisdictions does the rule prevail that has been announced in New York. The United States Court for the Southern District of that State refused to follow that rule, and adopted the rule that an explosion of oil in a building was *prima facie* evidence of negligence on the part of the defendant. "In the Court of Appeals of this State," said District Judge Brown, "it was held that an explosion in a building, unaccompanied by any explanation by the owner, or by any evidence of care on his part, furnishes no presumption of negligence";⁴⁰ and this was reaffirmed in *Reiss v. Steam Company*.⁴¹ The opposite conclusion, held by Judge Wallace,⁴² seems to me to be more sensible and just, and more in accordance with legal principles and analogies. The same ruling was made on appeal in the Circuit Court.⁴³ This ruling is based upon the principle (of wide application in the law of torts), that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence, and place upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident; and also upon the principle of evidence, that he who has peculiarly within his power the means of producing evidence of reasonable care, shall be required to produce it." The opinion concludes, however: "The cause of the accident is, in fact, unexplained. Either an accidental fire, or some violation of the rules by workmen in smoking, or carrying a light, seem the only imaginable causes.

or "is *prima facie* evidence of," are not to be understood as meaning that there is a presumption of fact, but that the jury are at liberty to draw the inference from them. *Carmody v. Boston Gaslight Co.*, 162 Mass. 539; 39 N. E. Rep. 184; *Smith v. Boston Gaslight Co.*, 129 Mass. 318. (See this case noticed in section 610); *Hutchinson v. Boston Gaslight Co.*, 122 Mass. 219. (See this case noted in section 609); *Tiehr v. Consolidated Gas Co.*,

51 N. Y. App. Div. 446; 65 N. Y. Supp. 10.

⁴⁰ Citing *Cozulich v. Standard Oil Co.*, 122 N. Y. 118; 25 N. E. Rep. 259.

⁴¹ 128 N. Y. 103; 28 N. E. Rep. 24.

⁴² Citing *Rose v. Stephens, etc. Transportation Co.*, 11 Fed. Rep. 438; 20 Blatchf. 411.

⁴³ Citing *The Sydney*, 27 Fed. Rep. 119, 123.

. . . The evidence offered by the defendants shows a business not specially dangerous when prosecuted with reasonable care; that there were suitable regulations, arrangements, and reasonable care exercised; and that there was no neglect by the defendants to enforce such regulations. I think this sufficiently rebuts the *prima facie* presumption of negligence; and on this ground the libel should be dismissed, but without costs." ⁴⁴

§613. Stop-cock on street line.

Unless some statute (or perhaps a municipal ordinance) requires it, a gas company is not required to place a stop-cock at the street line, or outside the building supplied, so it can shut off the gas without entering the premises when necessary; and if the stop-cock is placed within the building supplied, the company is not required to enter and cut off the supply when notified by the consumer to discontinue the gas. In such an instance it is the duty of the owner of the building, or the tenant if in possession, to cut off the supply by turning the stop-cock.⁴⁵ Where the stop-cock in a supply pipe outside of a mill supplied with gas had been covered up by a third person and could not be used to turn off the gas during a fire in the mill, it was held that the owner of the building could not recover from the person who had covered it up where the mill took fire from an independent cause, and the owner had allowed the stop-cock to remain covered more than a year; for the inability to use the stop-cock was not the proximate cause of the injury, although

⁴⁴ Warn v. Davis Oil Co., 61 Fed. Rep. 631; Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718; Dunlap Steamboat v. Reliance, 2 Fed. Rep. 249; Grimsley v. Hawkins, 46 Fed. Rep. 400 (boiler explosion).

In Belvidere Gaslight and Fuel Co. v. Jackson, 81 Ill. App. 424, it was held that the fact of the gas company using all reasonable and proper precautions in the erection

and operation of its plant, using the most and best machinery and appliances, and did all a prudent person could do to prevent gas escaping, did not, of itself, in case actual damage resulted to others, relieve the company from liability. See also Rockford Gaslight, etc., Co. v. Ernst, 68 Ill. App. 300.

⁴⁵ Holden v. Liverpool Gas Co., 3 C. B. 1; 15 L. J. Q. P. 301; 10 Jur. 883.

the damages may have been increased by the escaping gas increasing the flames.⁴⁶

§614. Intervening agency.

A gas company is bound to know the consequences that will probably follow its act of negligence; as, for instance, the use of defective pipes and the turning of gas into them, especially at a high pressure. In an instance of use of such pipes and the maintenance of a high pressure, and gas escaped and an explosion followed, it was said that it was not necessary to charge in the complaint that the gas company had special knowledge or notice of the happening of such consequences flowing from its original negligence, in the order in which it occurred. "No principle is better settled," said the court, "than the one that every person who is *sui juris* is presumed to know and in duty bound to anticipate the natural and usual consequences flowing from his unlawful acts or omissions. The only serious trouble that sometimes arises in the application of this principle is in determining whether or not a given result may be said to be such a natural and ordinary one as to be properly chargeable to the defendant's negligent act or omission, and this is what has given rise to the doctrine of proximate cause. The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof, if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. The negligence charged may be the proximate cause, although not

⁴⁶ *Cochran v. Philadelphia, etc., Co.*, 184 Pa. St. 565; 39 Atl. Rep. 296.

Where it is alleged a leak occurred at a certain place, evidence as to whether a stop-cock on the top of an upright pipe is a dangerous method of shutting off the gas must be rejected. *State v. Consolidated Gas Co.*, 85 Md. 637; 37 Atl. Rep. 263.

If a gas company imperfectly

cut off the gas when its use is discontinued, or if it undertake to close the aperture in the service pipe and does it so gas escapes, it will be liable for an explosion occasioned by the gas escaping because of the imperfect work. To undertake to do the work, and to do it imperfectly, is such an act of negligence as will render the company liable. *Lanigan v. New York, etc., Co.*, 71 N. Y. 29.

the immediate one; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury." ⁴⁷ Abundance of illustrations will be found in these pages of the principle thus laid down. ⁴⁸ Where a complaint alleged that the gas company negligently failed to turn off the gas from a tenement, after directions so to do, in order that a defect in the pipe within the cellar might be located and repaired; and that the plaintiff, a plumber, while searching for the defect, was injured by an explosion, it was held that it did not show the injury was the proximate cause of the gas company's negligence; for there was a presumption that there had been an intervening responsible agency, for which such company was not responsible. ⁴⁹

§615. Inspection of pipes or mains.

A gas company is chargeable with notice of the fact that gas pipes and mains are liable to rust and decay, and by reason of

⁴⁷ *Alexandria Mining, etc., Co. v. Irish*, 16 Ind. App. 534; 44 N. E. Rep. 680.

⁴⁸ An illustration came under the personal observation of the writer. Natural gas escaped from a street main and entered a sewer. The gas company were negligent in permitting it to escape. It flowed along the sewer until it came to a man-hole in the street, and escaped; and a horse's iron shoe striking upon the asphalt pavement surrounding the man-hole produced a spark of fire which ignited the gas escaping from the man-hole. An explosion was thereby occasioned and the horse injured. The gas company settled for the injury occasioned by the explosion.

Another case came under the writer's notice somewhat illustrating the subject of this section. The case was in the Federal Circuit Court of Indiana. A plumber took a key,—

which was about six feet long,—to turn off water, at the property line, of a city water company. He got on the front end of an open street railway car drawn by horses, with nothing between him and the driver. In handling the brake the driver let it loose in the usual way, when the handle flew around, struck the key in the plumber's hand, and knocked it from his grasp. The key struck the hammer of a revolver in the driver's pantaloons' hip-pocket, causing the revolver to go off. The bullet from the revolver lodged in the brain of the plumber, killing him instantly. It was illegal for the driver to carry a revolver, and contrary to the street railway company's orders; but the company was held liable.

⁴⁹ *McGahon v. Indianapolis, etc., Co.*, 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355.

such rusting or decaying permit gas to escape.⁵⁰ They are also chargeable with notice of the liability of pipes and mains laid in streets to become broken by reason of the travel in the streets or of the settling of the earth, especially when sewers have been or are being constructed or other pipes laid therein, or the streets are being repaired. And in these modern times when the use of electricity has become so universal there is no doubt that they are chargeable with notice of its effect upon iron or steel pipes, and its tendency to destroy the fibres of the iron or steel, weaken the pipes and render them unsafe instruments for the conveyance of gas.⁵¹ Being thus chargeable, a duty devolves upon gas companies to inspect their pipes and mains and the connections therewith. It must use reasonable care in making these inspections; and if a leak could have been discovered and prevented by such an inspection, that fact of itself will be sufficient to charge the company with negligence, if it fail to make the inspection.⁵² And this is true of a company that purchases the plant of another company, with respect to such plant; for its liability is not dependent on its knowledge of the pipes' defective condition, or escaping gas; but upon its care in keeping the pipes in a reasonably safe condition, and using them so as to not unnecessarily injure persons and their property.⁵³ It has been held that it is a question for the jury whether a gas company which had no system of inspection, but waited for complaints before ordering an inspection, to detect a leak in the pipes, is chargeable with negligence.⁵⁴ In a Pennsylvania case it was said: "While no absolute standard of duty in

⁵⁰ *Pritchard v. Consolidated Gas Co.*, 2 Pa. Super. Ct. 179; 39 W. N. C. 28.

⁵¹ *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183.

⁵² *Pine Bluff, etc., Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; *Rockford Gaslight Co. v. Ernst*, 68 Ill. App. 300; *Tiehr v. Consolidated Gas Co.*,

51 N. Y. App. Div. 446; 65 N. Y. Supp. 10; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785; *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183.

⁵³ *Dow v. Winnepesaukee Gas, etc., Co.*, 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569.

⁵⁴ *Pritchard v. Gas Co.*, 2 Pa. Sup. Ct. Rep. 179; *Pritchard v. Gas Co.*, 39 W. N. Cas. 28.

dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes or from any other cause within the circumspection of men of ordinary skill in the business.⁵⁵ It requires nothing unreasonable — it does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas.”⁵⁶ Where the company could have discovered the defect in its pipe by the smell of the escaping gas, if it had made a proper inspection, it was held that it was no defense in the company to show that it sent a workman to repair the pipe as soon as it had notice of the leak, he arriving too late to do so.⁵⁷ Of course, a gas company is required only to inspect its own pipes and apparatus.*⁵⁷ Strictly speaking, it has no right to enter upon private premises, except in so far as its own property extends; but the usual contract between a gas company and a consumer gives them the right to enter the premises and inspect the gas apparatus, not, however, imposing upon it, in terms, a duty to inspect. There is no doubt that if a gas com-

⁵⁵ Citing *Kibele v. City of Philadelphia*, 105 Pa. St. 41; *Holly v. Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 273; *Smith v. Gaslight Co.*, 129 Mass. 318.

⁵⁶ *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. Rep. 653; 18 L. R. A. 759; quoted in *Consolidated Gas Co. v. Crocker*, 82 Md. 112; 33 Atl. Rep. 423; 31 L. R. A. 785; *State v. Consolidated Gas Co.*, 85 Md. 637; 37 Atl. Rep. 263.

⁵⁷ *Mose v. Hastings, etc., Co.*, 4 F. and F. 324; 13 Gas J. 231; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; *Consumers' Gas Co. v. Corbaley*, 14 Ind. App. 549; 43 N. E. Rep. 237.

*⁵⁷ *United Oil Co. v. Roseberry (Colo.)*, 69 Pac. Rep. 588. See *Smith v. Pawtucket Gas Co.*, 25 R. I. —; 52 Atl. Rep. 1078.

pany undertake the inspection of the pipes and gas fixtures of a house or building they are bound to exercise diligence in discovering leaks or escaping gas, the same as if they were their own pipes and fixtures.⁵⁸ A gas company may insist upon the right to enter on the premises and inspect the pipes and gas fixtures, before turning on a supply of gas, to see if they are in a fit condition to receive it; ⁵⁹ but it in fact is not bound to do so, for it may take the property owner's assurance that all things have been made safe for its reception, or it may refuse to furnish him gas, unless it be given the right to inspect. If, therefore, after such assurance the company should turn on the gas, which should escape at a point beyond the place where the company's duty to inspect ceases, and from the escaping gas an explosion occur, the neglect would be that of the property owner, and not that of the gas company.⁶⁰ An English case furnishes an illustration on this point. The plaintiff was the owner of a new house, which was divided into two separate flats, an upper and lower one, each flat having a separate entrance from the street. When he built the house, the plaintiff put in a service pipe from the street, running it under the hall door steps inside the wall of the house to the upper flat. The tenant of the upper flat gave notice to the gas company to supply his flat with gas; and thereupon the company made connection between its main in the street and the service pipe, supplied and fixed a meter in the flat, and turned on the gas. Owing to a defect in the service pipe, which the plaintiff had supplied, leading to the meter, gas escaped and exploded, injuring the house, about an hour after it was turned on. In a suit to recover damages for injuries to the house, the court ruled that there was no duty resting on the gas company to test the service pipe; and the jury having found that proper connection had been made by the com-

⁵⁸ *Lannen v. Albany Gaslight Co.*, 46 Barb. 264; 44 N. Y. 459; *Ferguson v. Boston Co.*, 170 Mass. 182; 49 N. E. Rep. 115. See *Vallee es qualite v. New City Gas Co.*, 7 Am. Law Rev. 767; *Bastian v. Keystone*

Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537.

⁵⁹ *Flint v. Gloucester Gaslight Co.*, 3 Allen 343; 9 Allen 552.

⁶⁰ *Holden v. Liverpool Gas Co.*, 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

pany between its main and the service pipe, judgment was given for it, the court not sustaining the plaintiff in his contention that if the company choose to use a pipe not laid by it, it was its duty to see if it were in good condition.⁶¹ If the gas company had put in the defective service pipe, there would have been no doubt of its liability to the plaintiff.⁶²

§616. Duty to make repairs immediately.— Available force.

It is not only the duty of a gas company to institute and maintain an efficient system of oversight and superintendence, but to be prepared with sufficient force ready to put in action and fully competent to supply and furnish a prompt remedy for accidents, defects, and the like.⁶³ This rule requires the company to take all necessary steps to prevent damages that may be occasioned by a leak as soon as it has knowledge of it; and, as elsewhere stated, it may be guilty of negligence in not discovering such leak. If it has no knowledge of the leak until informed of it, and has not been otherwise guilty of negligence — as, for

⁶¹ *Henderson v. New Castle, etc.*, Gas Co., 37 Sol. J. 403.

⁶² *Burrows v. Marsh Gas and Coke Co.*, L. R. 7 Exch. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

When the evidence showed negligence on the part of the gas company, the admission of opinion evidence as to whether an inspection should have been made was held not judicial error. *United Oil Co. v. Roseberry (Colo.)*, 69 Pac. Rep. 588.

Whether or not a gas company is guilty of negligence in not inspecting a house that has been vacant for nearly a month, is a question for the jury. *Baltimore Consolidated Gas Co. v. Getty (Md.)*, 54 Atl. Rep. 660.

If an agent of a gas company testifies that he inspected the prem-

ises and did not find gas escaping in dangerous quantities; a witness may testify that he told him at the time that there was gas enough in the cellar to blow up the house if he would go down into it with a light, in order to contradict him. *Hunt v. Lowell Gaslight Co.*, 3 Allen 418.

⁶³ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233; *Rockford, etc., Co. v. Ernst*, 68 Ill. App. 300; *Belvidere, etc., Co. v. Jackson*, 81 Ill. App. 424; *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; *Otersbach v. Philadelphia*, 161 Pa. St. 111; 28 Atl. Rep. 991; *Anderson v. Standard Gaslight Co.*, 40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625; *Pine Bluff, etc., Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366.

instance, not having used proper piping, or maintained a proper system of inspection — its liability will depend upon the question whether or not it has used due diligence to prevent the injury after it has received notice of the leak. The liability of the company turns upon the question whether it has used due care to prevent an injury after it has notice of the danger; and the care it must use, whether due care, must be measured by the possibility and likelihood of an injury being inflicted.⁶⁴ In an instance of this kind evidence, in defense, of the company's system and course of business in regard to complaints of leaks is admissible;⁶⁵ and also of the precautions it takes to repair leaks.⁶⁶ In the case of a great fire — as the Chicago and Boston fires — the celerity required in stopping leaks must be measured by their number, the extent of the territory over which they are spread, and the amount of available force obtainable to make the repairs. In such instances great energy is required of the company, because the danger is great, but not the impossible.⁶⁷

§617. Notice of leaks.

It is the duty of a gas company as soon as it receives notice of a leak to take all necessary steps to prevent an explosion. It matters not through what sources it receives information that there is a leak, it must at once act. It cannot be expected that a gas company will repair a leak of which it has no notice; but it may be guilty of negligence in not discovering it, and if it is, it will be liable for damages occasioned by the leak.⁶⁸ Any one

⁶⁴ *Hunt v. Lowell Gaslight Co.*, 1 Allen 343; *Chisholm v. Atlanta Gaslight Co.*, 57 Ga. 28; *Pine Bluff, etc., Co. v. McCain*, 62 Ark. 118; 34 S. W. Rep. 549; *Rockford Gaslight and Coke Co. v. Ernst*, 68 Ill. App. 300; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; *Hoin v. Lancaster*, 13 Lanc. L. Rev. 131.

⁶⁵ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233.

⁶⁶ *Powers v. Boston Gaslight Co.* 158 Mass. 257; 33 N. E. Rep. 523.

⁶⁷ *Hutchinson v. Boston Gaslight Co.*, 122 Mass. 219.

⁶⁸ *Pine Bluff, etc., Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; *State v. Consolidated Gas Co.*, 85 Md. 637; 37 Atl. Rep. 263; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262.

may give the company notice of the leak, and it will be bound by it. In one case it was said that "any inmate of plaintiff's family was competent and had a right to communicate to the defendants that the gas was escaping from some leak in their pipes into the house, making its occupancy either unsafe or disagreeable or offensive"; that it was proper for the plaintiff's wife to send a message to the company to that effect by any person to whom she thought fit to intrust it; and that it was immaterial how, by what means, or through whom it obtained information, so that it was sufficient to inform them of the leak.⁶⁹ In an action for damages occasioned by gas escaping into plaintiff's cellar from a break in the main pipe in the street, it was decided by the court "that if the defendant's servants, the officers of the company, did not know, and by the use of due care could not ascertain, that the gas was escaping into the plaintiff's house, or had reasonable cause to believe that it was not, and no notice was given by the inmates of the house to them that gas was in the house, the defendant is not liable; but if they did know, or if, with their knowledge of the condition of the street, they had reasonable cause to suspect that the gas had entered or was entering the plaintiff's house in dangerous quantities, and gave no notice to the inmates, the company is liable in damages if the plaintiff used due care."⁷⁰ So where the explosion took place in a factory supplied neither with gas nor gas pipes, the street line being within a few feet of the cellar wall; and a few months before a sewer connection for the building had been made which passed under the street line; the claim being made that the gas escaped from a break in the pipe, passed through the sand until it reached the sewer pipe, and followed that into the cellar, and there collected; in support of the claim testimony being given that escaping gas had been detected at that point for several weeks prior, and that soon afterwards an old rusty break in the gas pipe immediately in front of the premises was discovered; and that the company was notified, more than two weeks before the accident, of the presence of

⁶⁹ *Hunt v. Lowell Gaslight Co.*,
1 Allen 343.

⁷⁰ *Bartlett v. Boston Gaslight
Co.*, 122 Mass. 209.

escaping gas in the neighborhood, but did nothing in response thereto; it was held that the case should go to the jury, even though the company denied receipt of the notice, and gave evidence in rebuttal of the plaintiff's case generally.⁷¹ Where the gas escaped from the defective pipes of a plant the company had purchased, the court held that the company's liability was not dependent on its knowledge of the pipes' defective condition or of the escaping gas, but on the observance of care by it in keeping the pipes in a reasonably safe condition, and using them so as to not unnecessarily injure others.⁷²

§618. Notice.— Failure to discover place of leak.

If a company has notice that gas is escaping, it must prevent its escape at its peril. The apparent quantity escaping is immaterial; for it is bound to investigate thoroughly the place where it is escaping and prevent such escape; and if it fall into error concerning the probable danger, believing that only a small quantity is escaping, and the gas in fact escapes in sufficient quantity to be dangerous, the company will be liable for its error in estimating the danger, and cannot shift the loss occasioned by the explosion upon the person injured in his property or person.⁷³ So if the company believes the gas is escaping at a particular place, and there attempts to prevent its escape by repairing the supposed defect in its pipe or apparatus, when in fact the leak is at another place, it will be liable for all the consequences following from the gas escaping.⁷⁴ But where the leak was apparently a small one, and the gas company's workmen searched for it with a light, it was held to be a question for the jury whether the action of the workmen was negligent.⁷⁵

⁷¹ *Henderson v. Allegheny Heating Co.*, 179 Pa. St. 513; 39 W. N. C. 485; 36 Atl. Rep. 312.

⁷² *Dow v. Winnepesaukee Gas, etc., Co.*, 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569.

⁷³ See *Otersbach v. Philadelphia*, 161 Pac. St. 111; 28 Atl. Rep. 991. *Anderson v. Standard Gaslight Co.*,

40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625.

⁷⁴ *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; *Pine Bluff, etc., Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366.

⁷⁵ *Ellis v. London Gaslight Co.*, 32 Gas J. 849. See *Richmond Gas*

§619. Notice of leak, when not necessary to fix liability.

It is the duty of a gas company to employ safe and sound mains or pipes for carrying gas to its customers. It must exercise due care in selecting and laying them, with a view to prevent leaks. If it does not exercise such care in selecting and laying them, or if it knowingly lays defective pipes and mains, it cannot insist that it had no notice of the leak that caused the damages. In such an instance it is chargeable with notice of their condition; and if a leak occur by reason of which damage is done to property or persons it will be liable, although it had no notice of the leak.⁷⁶

§620. Evidence of notice to gas company of danger to mains.

It is always admissible to show that the gas company had notice of danger to its mains and pipes, from whatever cause, when the charge is that the pipes were broken because of such threatened danger and not repaired within proper time. Illustrations of this rule are excavations in the public streets in the near proximity to the mains or pipes that were broken by reason of such excavations. Thus where gas escaped from a broken pipe in the street, the break being occasioned by reason of a subway being constructed in the street, a letter from the chief engineer of the construction company to the superintendent of the gas company relative to its pipes and offering facilities to it to examine and care for them; and also testimony of conver-

Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049 36 L. R. A. 683. See Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537.

⁷⁶ Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Hampton v. Cradley Heath Gas Co., 14 Gas J. 606; Smith v. Boston Gaslight Co., 129 Mass. 318; Crane v. Columbus Construction Co., 73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233; United Oil Co. v. Roseberry (Colo.), 69 Pac. Rep. 588.

“It was not necessary to aver that appellant knew the gas was escaping from the broken pipes and percolating through the ground to the place of the explosion. If the appellant had knowledge of the imperfect condition of the pipes as charged, it was bound to know also that gas would escape. This was one of the natural results of the appellant's negligence and for these, it is responsible.” Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

sations between the engineer of the construction company and the engineer of the gas company in which the latter was recommended to have an inspector on the line of work, were held admissible on the ground that it tended to show to the gas company the peculiar dangers to which the pipes were exposed and the opportunity afforded it to guard against them.⁷⁷ Where a gas company had repeatedly repaired a cracked elbow it had put in, that was held to be sufficient evidence of notice of the defect and to hold it liable for a failure to remove it or to close the crack.⁷⁸ So it may be shown that the company was directly notified of the escaping gas — such as a notice to its pipe line walker⁷⁹ — that workmen were seen digging at the place for breaks in the gas pipes with tools branded with the initials of the company — the same brands as were on the tools of the men who fixed the break after the explosion — in order to show knowledge on the company's part that the pipe in that locality frequently leaked.⁸⁰ Testimony by a former occupant of a building that gas was smelled in the cellar a year previous to the time of the explosion was held admissible, where there was other evidence of such a smell after such occupant left the building, and extending up to about the time of the explosion.⁸¹

§621. Evidence of other leaks.

Evidence of a leak from which gas escaping did not cause the injury is not admissible, although gas escaping from a leak did cause the injury; but if gas from both of them com-

⁷⁷ *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183.

⁷⁸ *Richmond Gas Co. v. Baker*, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683; *Consumers' Gas Trust Co. v. Corbaley*, 14 Ind. App. 549; 43 N. E. Rep. 237.

⁷⁹ *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

⁸⁰ *Lewis v. Boston Gaslight Co.*, 165 Mass. 411; 43 N. E. Rep. 178.

Evidence that the horse injured

was on the right side of the street is not such a fatal variance as will defeat a plaintiff who alleges that the horse was on the left side; nor is the verdict erroneous when such a variance is specifically shown by the finding. *Alexander Mining, etc., Co. v. Irish*, 16 Ind. App. 534; 44 N. E. Rep. 680.

⁸¹ *Werner v. Ashland Lighting Co.*, 84 Wis. 652; 54 N. W. Rep. 996.

bined to any extent, then evidence of both leaks are admissible. But if the charge is that the gas pipes were old and decayed, or had been injured by the soil in which they were laid, or by electrolysis, then evidence of other leaks near by or in the same neighborhood, where the conditions are the same, is admissible to show that the gas company had notice that the pipes had become decayed by long use, or affected by the nature of the soil, or by electrical action, at the place from which it is charged the gas escaped, and consequently fix upon it the charge of negligence in not finding and repairing the particular defect.⁸²

§622. Evidence of leaks.

In proving a leak in a street main, from which the escaping gas caused an injury by explosion, the testimony of persons residing in the neighborhood, to the effect that they had smelt gas for some time and on the day of the explosion, is admissible, on the theory that it tended to prove the leak.⁸³ Nor is the evidence of witnesses, to the effect that they had perceived an odor indicating the escape of gas from certain street mains, rendered incompetent by subsequent evidence assigning another cause for the odor.⁸⁴ And a witness may testify that the odor was similar to the odor of escaping gas elsewhere several months before, the purpose being not to prove another leak, but merely to identify the odor.⁸⁵ Evidence of the condition of the ground through which the gas escaped into the house injured by the explosion — such as it was blackened by the gas, and would burn when a light was applied to it — as well as that gas flowed from the defect in the pipe after the explosion, is admissible.⁸⁶ Where the charge was that the gas escaped into a sewer and thence into

⁸² *Emerson v. Lowell*, 3 Allen 410. This case is not exactly in point; but it is believed that the proposition laid down in the text is supported by it in principle.

⁸³ *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183; *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; *Smith v.*

Boston Gaslight Co., 129 Mass. 318; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. 110; 47 N. Y. Supp. 262.

⁸⁴ *Koplan v. Boston Gaslight Co.*, *supra*.

⁸⁵ *Koplan v. Boston Gaslight Co.*, *supra*.

⁸⁶ *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

plaintiff's house, in order to show that the gas company did not use due diligence in finding and stopping the leak after notice, it was held proper to show by witnesses passing along the street to what extent the gas escaped in the street and also that it escaped from the same sewer through which it reached plaintiff's house into other houses at points beyond, if the company had notice of that fact; but it was not admissible to show that wherever the gas escaped into other houses sickness followed.⁸⁷ It may be shown that the ground was frozen and the gas could not escape into the air; but would naturally follow along any opening under the frozen surface.⁸⁸

§623. Breaks occasioned by ordinary use of streets.

A gas company is bound to lay its pipes in such a manner that the ordinary use of the streets for traffic will not break them; and to not do so is an act of negligence.⁸⁹ And the same is true in regard to an instance of repair of a street. Thus where, in repairing a street, a heavy steam roller passed over its surface several times, breaking water pipes from which water bubbled up to the surface, and shortly an explosion occurred, the municipal corporation, which owned the gas pipes, were held liable, although the pipes were laid under thirteen inches of granite and concrete, which was equivalent to thirty inches of earth, a witness testified. It was shown that the roller had broken pipes at other times; and that pipes had been broken through a subsidence of the ground, which was loose and shifting. It was also shown, however, that the roller sometimes had gone over the ground without breaking pipes.⁹⁰

§624. Action of frost.

It is the duty of a gas company to lay its pipes sufficiently deep, so that they will be beyond the action of frost. This is

⁸⁷ *Emerson v. Lowell*, 3 Allen 410. *Gaslight Co. v. Bishop*, 81 Ill. App. 493; *Hampton v. Cradley Heath Gas Co.*, 14 Gas J. 606.
⁸⁸ *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262.
⁸⁹ *Brown v. New York Gaslight Co.*, —Anthon N. P. 351; *Aurora*

⁹⁰ *Pocock v. Brighton*, 31 Gas J. 429.

true with respect to its power to supply its consumers; for if it were to lay its pipes so near the surface that frost would prevent the flow of gas in extreme weather, it would not be performing its duty towards its consumers. So if pipes were thus laid and the pipes should be broken by reason of the frost, permitting gas to escape to the injury of a person, the company would be liable; although it should immediately stop the leak, enough gas having escaped to cause the damage.⁹¹

§625. Pipes breaking from lack of support.—Excavations near pipe line.

If the gas company has laid its pipes or mains in improper soil — in other words, if they are not properly supported — it is chargeable with notice of the tendency of such soil to sink or subside, leaving the pipes or mains without proper support, whereby they are broken. The improper laying of a gas pipe is an act of negligence; and if for that reason it break, gas escape, and an explosion inflict an injury, it will be liable, the plaintiff not contributing thereto.⁹² Evidence of the existence in the street of holes and depressions is admissible to show that the gas company knew, or should have known, that the street was likely to settle and cause its pipes therein to break.⁹³ If excavations are made in the street near the company's mains, it must examine such excavations, in order to see how they may affect its mains, take all necessary steps to prevent the earth so

⁹¹ *Kockford Gaslight and Coke Co. v. Ernst*, 68 Ill. App. 300; *Schermerhorn v. Metropolitan Gaslight Co.*, 5 Daly 144. In *Hampton v. Cradley Heath Gas Co.*, 14 Gas J. 606, it is said that a gas company is not liable if a pipe is broken by a change in the weather.

⁹² *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493; *Crane Co. v. Columbus, etc., Co.*, 73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp.

262; *Metzger v. Schultz*, 16 Ind. App. 454; 43 N. E. Rep. 886; 45 N. E. Rep. 619; *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

⁹³ *Lewis v. Boston Gaslight Co.*, 165 Mass. 411; 43 N. E. Rep. 178; *Koelsch v. Philadelphia*, 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653; *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

settling as to not break them. Thus, where it appeared that the leak was caused by a failure of the city in constructing a sewer to properly pack the earth, whereby the gas main that broke was allowed to settle; it was held that the question whether or not the gas company had used due diligence to see that the earth was properly put back so as to support its pipes was properly left to the jury.⁹⁴ In a like case where the gas had been leaking for a day before the injury, it was held proper to give the jury an instruction that the plaintiff could not recover if the city did not properly tamp the earth when replacing it, if the defendant was ignorant of that fact, and the surface of the earth did not show the defective tamping, there being evidence that tests could easily have been applied to determine whether or not the dirt was properly tamped.⁹⁵ Where a gas company had no notice of the excavation, nor of gas escaping, nor that its pipe had been deprived of its support; and the traffic on the street caused it to break, letting the gas escape for two or three days before the explosion, it was held that the character of the break, the length of time the gas was escaping, and the absence of any one on behalf of the company at the time and the place of the excavation, constituted evidence of negligence on its part; and the appeal was dismissed.⁹⁶ The fact that the excavation is made by the city, or by a city contractor, in building a sewer or making other public improvements, does not relieve the gas company, where the failure to repair is the proximate and not the remote cause of the accident.⁹⁷ Where the charge was negligence in not stopping a leak in the main, a notice issued by the company to its consumers, calling attention to the liability of leaks occurring from the digging up of streets by various corporations, copies of which had been distributed by

⁹⁴ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Price v. South, etc., Gas Co.*, 65 L. J. Q. B. 126; 12 T. L. R. 31. See *Vickerman v. Leeds, etc., Co.*, 15 Gas J. 654; *Chadwick v. Corporation of Wigan*, 28 Gas J. 562.

⁹⁵ *Greaney v. Holyoke*, 174 Mass. 437; 54 N. E. Rep. 880.

⁹⁶ *Price v. South, etc., Co.*, 65 L. J. Q. B. 126; 12 T. L. R. 31.

⁹⁷ *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1. In this case the gas company had notice of the leak sufficiently long before the explosion to have repaired it.

its agents within a year prior to the accident, was held admissible in evidence on the question of due care on the part of the company.⁹⁸

§626. Property owner's duty to notify gas company of leaks.

The duty of notifying a gas company of a leak on his premises is imposed upon its owner, and he must give the company notice of it as soon as, or at least within a reasonable time after, he discovers it. The time within which he must give the notice depends upon the amount of gas escaping and the danger that will probably be incurred by delay. If the leak should be insignificant in amount, there is not that urgency required as if it was in a large amount. The leak may be apparently insignificant in amount, and yet still be very considerable. In such an instance the property owner is justified in measuring his conduct by the appearance of things; yet even here, as escaping gas is a very dangerous thing, he is required to act with that promptitude commensurate with the probable danger. In one case, to recover damages occasioned to his health by escaping gas, the court ruled that if the plaintiff discovered the leak early enough in the day to have had it repaired by night, if he had at once notified the company, and if, in consequence of such neglect to notify it, the leak was not repaired that night, and the plaintiff was injured by the escaping gas, such delay in giving notice would be evidence to be considered by the jury

⁹⁸ Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

The fact that no nails, wire or chain was found after an explosion of a gas pipe, is not sufficient to show that the pipe was not supported at the time the premises were leased, where the undisputed evidence shows that the pipe was supported by a chain or wire suspended from a joist when first put in. Metzger v. Shultz, 16 Ind. App. 454; 43 N. E. Rep. 886; rehearing denied, 45 N. E. Rep. 619.

Upon the question whether the pipe was handled carefully and laid properly, a witness may not give his opinion as to whether the line was laid with proper skill or care, but he may give an opinion to show that men of experience and skill were employed, accompanied by a statement as to what carelessness or lack of skill there was in the execution of the work. Crane Co. v. Columbus, etc., Co., 73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233.

of want of such ordinary care as would defeat the action, although the defendant may have been negligent.⁹⁹ In the case of escaping gas it is undoubtedly the duty of the owner of the premises to turn off the gas, if he can reasonably do so, until the servants of the company arrive and take charge of the gas apparatus.¹⁰⁰ Where foul ammoniacal water and odors had leaked into the plaintiff's cellar from a leak in a pipe, for nine months, to his damage; and he then gave notice to the gas company of the leak, and they repaired the leak within five days, it was held that he was entitled to recover the damages he had suffered within such five days, because of his failure to give notice when the leak began and during the period of nine months.¹⁰¹ So where the leak was discovered at night; and plaintiff did nothing until the next morning, although all consumers were requested on the back of their bills to notify the gas manager at once in case a leak was discovered; and in the morning the plaintiff employed a plumber to search for the leak, who did so with a lighted candle, when an explosion followed, it was held that there was such contributory negligence as to prevent a recovery.¹⁰² Plaintiff's house was ninety feet from the leak in the main of the defendant company. The gas passed under the frozen surface of the earth to her cellar. She was not a customer for the gas of the defendant, but was of another company. Owing to a disease, she was not able to detect the escaping gas by the odor. She opened the cellar door, and after a few minutes the gas flowed into a room where she had a lighted lamp, and an explosion was occasioned by the gas coming in contact with the flame of the lamp. It was held that her failure to notify the defendant of the leak, even though she knew of its existence, did not constitute contributory negligence. In such an instance it was only reasonable in her to

⁹⁹ *Holly v. Boston Gaslight Co.*, 3 C. B. 1; 15 L. J. C. P. 301; 10 8 Gray 123; 69 Am. Dec. 233; *Hunt v. Lowell Gaslight Co.*, 1 Allen 343; *Hills v. Gaslight Co.*, 13 Gas J. 877. See *Parkin v. Wirksworth Gas Co.*, 26 Gas J. 946.

¹⁰⁰ *Hills v. Gaslight Co.*, 13 Gas J. 877.

¹⁰¹ *Hills v. Gaslight Co.*, 13 Gas J. 877.

¹⁰² *Parkin v. Wirksworth Gas Co.*, 26 Gas J. 946. See *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209.

¹⁰⁰ *Holden v. Liverpool, etc., Co.*,

suppose that the gas escaped from the pipes of the company supplying her with gas.¹⁰³

§627. Company misleading plaintiff as to extent of danger.

If the gas company mislead the plaintiff concerning the extent of the danger he is incurring, or lulls his suspicions, whereby he is misled to his injury, it will be liable. In cases of doubt as to the danger, a person has a right to rely upon the representations of the servants or agents of the company; and even in cases where the danger appears to be a probable one, under the assurance of the servant or agent of the company, who the plaintiff knows ought to know whether or not there is danger, that there is none, the plaintiff may rely thereon, and recover if he is injured; unless he be as experienced in such matters as such servant or agent. And if the plaintiff is as experienced as the servant or agent of the company, yet if his knowledge is not such as to certainly show there is a danger; and such servant or agent, who the plaintiff believes, or has a right to believe, has a more accurate knowledge of the situation than he, by words or actions lulls his suspicions, and for that reason he does not take the precautions he otherwise would, and is injured, he can recover. Thus where a consumer smelt escaping gas, but was assured by the company's employee there was no leak, it was held that he was not guilty of such contributory negligence as would prevent a recovery for a loss occasioned by the leaking gas exploding.¹⁰⁴

§628. Municipality operating plant.

If a municipality supplies gas to private consumers, it will be liable for the negligence of its servants, or for its negligent

¹⁰³ Consumers' Gas Trust Co. v. etc. Co., 98 N. Y. 115; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215; 306; 32 L. R. A. 146.

¹⁰⁴ Anderson v. Standard Gaslight Co., 17 N. Y. Misc. 625; 40 N. Y. Supp. 671; Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683; Lee v. Troy, Washington Gaslight Co. v. Eckloff, 7 App. D. C. 372; Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 772.

acts, the same as an individual or private or semi-private corporations engaging in the same business and being guilty of the same negligence are liable.¹⁰⁵ It is held to the same degree of diligence and care.¹⁰⁶ The operation and maintenance of a gas or lighting plant by a city is a private corporate function as distinguished from purely governmental function, rendering the city liable the same as an individual.¹⁰⁷

§629. Gas following supply pipe from main.—Percolating through soil.—Sewer.

Gas companies are chargeable with notice of the fact that the tendency of gas escaping from their mains in the street is to follow the supply pipe into the house supplied, especially where the soil is not packed closely around such supply pipe; that it has the same tendency to follow their mains; that when it enters a sewer it will follow that into the houses and that it will even percolate the soil, thereby reaching cellars and rising to other parts of the building. Gas may follow pipes for long distances, and through these avenues find its way into buildings, there exploding without any seeming connection between the place of its escape and the place of explosion. In all such instances the original negligence is either failure to detect the leak or else the use of such pipes as in which in all reasonable likelihood leaks will occur. The apparent nature of the soil may be such, or the distance between the place of the leak and that of the explosion so great that no reasonable apprehension exists of gas

¹⁰⁵ *Strawbridge v. Philadelphia*, 13 Phila. 173; 36 Leg. Int. 276; 13 Rep. 216; *Strawbridge v. Philadelphia*, 2 Penny 419; *Littman v. New York City*, 36 N. Y. App. Div. 189; 55 N. Y. Supp. 383; affirmed 159 N. Y. 559; 54 N. E. Rep. 1093; *Shuter v. Philadelphia*, 3 Phila. 228; 15 Leg. Int. 333; *Esberg-Trust Cigar Co. v. Portland*, 34 Ore. 282; 55 Pac. Rep. 961 (water); *Ottersbach v. Philadelphia*, 161 Pa. St. 111; 28 Atl. Rep. 991; *Pocock v.*

Brighton, 31 Gas J. 429; *Scott v. Mayor, etc., of Manchester*, 37 Eng. L. & Eq. 495; 2 H. and N. 204; 26 L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598; *Chadwick v. Corporation of Wigan*, 28 Gas J. 562; *Boothman v. Mayor, etc., of Burnley*, 20 Gas J. 585.

¹⁰⁶ *Hoin v. Lancaster*, 13 Lanc. L. Rev. 131.

¹⁰⁷ *Bullmaster v. St. Joseph*, 70 Mo. App. 60.

traveling through such a soil or for such a distance; yet, nevertheless, either one of these facts will not defeat the action, the fact remaining that the gas was negligently permitted to escape, and that it actually did travel through the soil or the distance intervening between the place of the leak and the place of the explosion, the character of the soil and the length of the distance only adding to the improbability of the gas passing through it or traveling so far.¹⁰⁸ If it be alleged in the complaint that the gas in sufficient quantities passed from the mains through the soil to the house to cause an explosion, the court cannot take notice that the complaint charges an impossibility; but the mere allegation of that fact in the manner indicated is not sufficient to withstand a motion to make the complaint sufficiently definite as to show how the gas was conducted from the leak in the main to the house.¹⁰⁹

§630. Withdrawing gas from mains without notice.

A gas company may be liable for negligence in withdrawing its gas without notice and for failure to give notice of its return. In this instance both acts must have been negligent. Thus where a consumer lighted the gas in a grate, lay down and went to sleep; after which the gas company withdrew the supply

¹⁰⁸ *Fare v. Bath Gaslight Co.*, 25 Gas J. 566; *Vickerman v. Leeds New Gas Co.*, 15 Gas J. 654; *Brown v. Illius*, 27 Conn. 84; *Hunt v. Lowell Gaslight Co.*, 1 Allen 343; *Holley v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233; *Smith v. Boston Gaslight Co.*, 129 Mass. 318; *Medex v. Gaslight and Coke Co.*, 15 Gas J. 75; *Littman v. New York*, 159 N. Y. 559; 54 N. E. Rep. 1093; affirming 36 N. Y. App. Div. 189; 55 N. Y. Supp. 383.

¹⁰⁹ *Mississinewa Mining Co. v. Patton*, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203. See cases of percolating through soil. *Consumers' Gas Trust Co. v. Per-*

rego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146 (ground frozen on surface); *Consolidated Gas Co. v. Crocker*, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785; *Alexandria Mining, etc., Co. v. Irish*; 10 Ind. App. 534; 44 N. E. Rep. 680; *Consumers' Trust Co. v. Corbaley*, 14 Ind. App. 549; 43 N. E. Rep. 237; *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262 (a frozen surface); *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819; *People's Gaslight Co. v. Amphlett*, 93 Ill. App. 194; *Henderson v. Heating Co.*, 179 Pa. St. 513; 36 Atl. Rep. 312.

without notice and then turned it on without giving notice it had done so, and the gas escaped into the room and injured the person so asleep, he having remained continuously asleep from the time he lay down until awakened by the escaping gas, it was held that the company was liable.¹¹⁰ To withdraw gas from the pipes of a house, without notice to the tenant or persons therein, when it is lighted; and to return it without notice, is a gross act of negligence on the part of the gas company, and a very dangerous thing to do.¹¹¹

§631. Undue pressure in mains.

In some States the pressure in natural gas mains is regulated by statutes; but we are not aware that such a statute has been made applicable to artificial gas mains. Thus where a statute required a company to use sound wrought or cast iron pipes, to test them to a pressure of four hundred pounds to the square inch, and to not exceed a pressure of three hundred pounds in their use, it was held to be an act of negligence to not test the

¹¹⁰ *Beyer v. Consolidated Gas Co.*, 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628; *Skogland v. St. Paul Gaslight Co.* (Minn.); 93 N. W. Rep. 668.

¹¹¹ See *McKenna v. Bridge Water Gas Co.*, 193 Pa. St. 633; 45 Atl. Rep. 52; 47 L. R. A. 790.

Increasing pressure without notice. *Indiana, etc., Co. v. Long*, 27 Ind. App. 219; 59 N. E. Rep. 410.

Where natural gas was withdrawn from the pipes without notice, until the fires went out; and, the house having become cold, the mistress went into the cellar to turn up the gas in the furnace, or to see what was the matter, and finding no fire in the furnace, and supposing that the servant or some of her children had turned off the gas, and

acting under this impression, no odor of gas being perceptible to her, and not examining the keys to see if it had been turned off, she threw a lighted match into the furnace preparatory to turning on the gas, but the furnace being full of gas from the fact that it had again been turned on (without notice), an explosion immediately followed, to her injury, it was considered by eminent counsel to whom the question of the company's liability was submitted, that she could not recover, because of her negligence in not ascertaining before throwing the lighted match into the furnace whether the gas had been returned into the pipes, or whether or not the keys were turned so as to shut it off.

pipes or to use a forbidden pressure.¹¹² So it is an act of negligence to unduly increase the pressure of natural gas whereby the stoves and furnaces in which it is used become overheated and set fire to the buildings in which they are situated; and this is especially true if the pressure increases late at night when no one is around to watch the fires. And it makes no difference that such increased pressure arises from the fact that many consumers have turned off the gas, thereby increasing the supply for fires kept burning, or that the pressure at the gas wells increased; for the company is bound to anticipate such increase of pressure and turn its valves so as to prevent it.¹¹³

§632. Evidence of undue pressure at other places.

The general rule is where it is charged that the company negligently so increased or permitted such an increase of the flow of gas as to overheat plaintiff's stoves or furnaces whereby his house was set on fire, that evidence cannot be given of the effect of such increase at other points where the company is furnishing gas; and in one case it was admitted by counsel that it must further be "shown that such overheated stoves were on the same low pressure pipe lines, received their fuel from the same supply under similar conditions, and through similar service pipes; that the mixers and burners were substantially the same; that the keys regulating the fires were turned down as in the stove

¹¹² Alexandria, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; Indiana, etc., Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410.

¹¹³ Alexandria, etc., Co. v. Painter, 1 Ind. App. 587; 28 N. E. Rep. 113; Alexandria, etc., Co. v. Irish, *supra*; Indiana, etc., Co. v. New Hampshire, etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485; Ibach v.

Huntington, etc., Co., 23 Ind. App. 281; 55 N. E. Rep. 249; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; Berns v. Gaston Coal Co., 27 W. Va. 285.

It is negligence for a natural gas company to permit its regulators or other appliances to remain for an unreasonable time in a condition that they will not control the amount and pressure of gas furnished. Barrickman v. Marion Oil Co., *supra*.

which burned appellee's house, and that there was no intervening regulator or hindrance to obstruct the free and uniform flow of gas in such lines." In this case the court added: "In other words, to make such evidence competent, it was first necessary to show that the general condition of the other stoves was in all essential respects similar to the one that caused the injury. Such evidence, when the conditions are thus shown, is admissible";¹¹⁴ and the court proceeded to make a quotation from a West Virginia case,¹¹⁵ in which it was said: "The condition and pressure of gas in the neighboring houses at the time of the fire, there being no intervening regulator or hindrance to the force of the gas between the burned house and the other houses mentioned, would clearly indicate what it was at the house of the plaintiff, and I see no valid objection to the answering of the questions." In the Indiana case in which the admission was made, as above stated, the court, after giving a summary of the evidence, said: "We think that all the witnesses who testified as to the condition of other stoves, etc., on that night, brought themselves within the rule laid down in the cases cited. That is, we do not think that before it can be shown that other stoves were overheated than the one causing the injury, where the supply of gas is received from the same general source, that such other stoves were supplied by the same sized service pipes, the same kind of valves, and the same kind of mixers; that they were the same general distance from the mains, and that the keys were turned down in just the same way. Such a rule would be unreasonable, and the law does not require unreasonable things to be done. The rule only goes to the extent as to require similar conditions to be shown."¹¹⁶ It would

¹¹⁴ *Indiana, etc., Co. v. Long*, 27 Ind. App. 219; 59 N. E. Rep. 410.

¹¹⁵ *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

In making this admission the counsel admitting it evidently had in mind the case of *Indiana, etc., Gas Co. v. New Hampshire,*

etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485.

¹¹⁶ The court then cites *Washington Tp., etc., Co. v. McCormick*, 19 Ind. App. 663; 49 N. E. Rep. 1085; and *Indiana, etc., Gas Co. v. New Hampshire, etc., Co.* *supra.* and says that they "should be so construed."

be folly to say that two persons living in different houses could testify or show to any degree of exactness, that they turned their keys just alike. But here it is shown that the service pipes were of different sizes, leading to different stoves, and yet the gas was forced through these different sized pipes where the keys were turned low to such a degree of pressure as to overheat the different stoves. The witnesses all received their gas from low pressure mains. It is not shown that the mixers were all alike, but it is shown that appellant furnished them, and we think all these facts make the evidence competent. Two witnesses were permitted to testify as to the high pressure of the gas used by them for illuminating purposes on the night appellee's property was destroyed. The gas so used by them was supplied from low pressure mains of appellant. It is shown that the gas used for illuminating purposes is supplied through different burners than those used for heating purposes; that the pipes are smaller as a rule and that where used for illuminating no mixers are used. It thus appears that in such case conditions are dissimilar from those where gas is used for heating, although the supply is from the same general source. Under these circumstances we are inclined to the opinion that the evidence was not admissible under the sale herein declared."¹¹⁷

§633. Explosion caused by act of servant of gas company.

If the explosion is brought about by the act of a servant of the gas company, the question of negligence is still one for in-

¹¹⁷ Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410. The court, however, considered that the testimony of these two witnesses was harmless in view of the overwhelming evidence of the negligence of the defendant.

Where the suit was to recover the amount of a promissory note given in payment for gas to be supplied the maker, and in a counter claim the defendant asked damages for failure to comply with the contract to furnish gas, it was held error to

admit in evidence the testimony of witnesses who received gas from the same main as defendant, to the effect that they had an insufficient supply of gas during the time in question, without showing that these connections were of the same or a similar character as that of the defendant, where it was the defendant's duty under the contract to conduct the gas from the main to his residence. Washington Tp., etc., Co. v. McCormick. 19 Ind. App. 663; 49 N. E. Rep. 1085.

vestigation; for the explosion may have been occasioned without any negligence on the part of the servant, in which event the company would not be liable. Whether or not the servant negligently occasioned the explosion is a question for the jury.¹¹⁸

§634. Company undertaking to repair consumer's pipes or fixtures.

It has already been stated that if a gas company undertake to inspect a consumer's pipes in his house it is chargeable with the same degree of care as it is in the inspection of its own pipes. And this is true where it undertakes to repair such pipes or the consumer's fixtures. Thus, where a notice to consumers was printed on the back of its bills that as soon as a leak in the house was discovered the company should be notified; and a consumer notified the company of such a leak, whereupon a messenger sent to the house, who said he had come to repair the leak, which he said was in a chandelier in the front room; and after examining it, stayed about twenty minutes, and left, saying it was all right; and that night the plaintiff was injured by the escaping gas, the leak being in the pipe inside the casing of the chandelier — it was held that the company was liable. "Entering upon the work," said the court, "the defendant was bound to do it with reasonable care."¹¹⁹ The same rule of reasonable care was applied where the gas company insisted upon making all gas connections between the house mains and its pipes.¹²⁰

¹¹⁸ *Hann v. Weymouth, etc., Co.*, 18 Gas J. 186; *Lannen v. Albany Gaslight Co.*, 46 Barb. 264; 44 N. Y. 459; *Ward v. Gaslight and Coke Co.*, 14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10, 38, 74, 108; *German Ins. Co. v. Standard Gaslight Co.*, 70 N. Y. Supp. 384; 34 N. Y. Misc. Rep. 594; *Ferguson v. Boston Gaslight Co.*, 170 Mass. 182; 49 N. E. Rep. 115; *United Oil Co. v. Roseberry (Colo.)*, 69 Pac. Rep. 588.

¹¹⁹ *Ferguson v. Boston Gaslight Co.*, 170 Mass. 182; 49 N. E. Rep. 115; *Anderson v. Standard Gaslight Co.*, 40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625; *United Oil Co. v. Roseberry (Colo.)*, 69 Pac. Rep. 588.

¹²⁰ *Bastian v. Keystone Gas Co.*, 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537. See also *United Oil Co. v. Roseberry (Colo.)*, 69 Pac. Rep. 588; and *Smith v. Pawtucket Gas Co. (R. I.)*, 52 Atl. Rep. 1078.

§635. Injury to shade trees.—Shrubbery.

If a gas company permit gas to escape from its pipes or mains whereby shade trees or foliage in the street or upon adjoining grounds are injured or killed by such escaping gas it will be liable for the damages occasioned. The owner of property may recover for trees, destroyed by the negligent escape of gas, planted by him in the street immediately in front of his premises.¹²¹ An instruction that the gas company is not liable, unless it could reasonably have apprehended that escaping gas would cause the death of vegetation is erroneous; for the company is bound to know the effect of gas upon trees and vegetation.¹²² Where evidence showed that the death of the trees was coincident with the leakage from the mains nearby of a large amount of gas; and that after the mains were recalked there was a renewed growth of vegetation, the verdict of the jury was not disturbed on appeal, although there was other evidence to show that the injury to the trees was not caused in the manner alleged.¹²³ It may be shown that other trees in the same vicinity were killed by gas leaking from the same place, where the charge is that the gas permeating the soil poisoned and killed the roots of the trees.¹²⁴ So where the charge is that the gas escaped into a sewer and thence into plaintiff's greenhouse, whereby his plants were killed, evidence is admissible to show the presence of gas in other greenhouses situated on the same sewer.¹²⁵

¹²¹Rockford Gaslight Co. v. Ernst, 68 Ill. App. 300; Armbruster v. Auburn Gaslight Co., 18 N. Y. App. 447; 46 N. Y. Supp. 158; Rauck v. Cedar Rapids Gas Co., 116 Iowa —; 89 N. W. Rep. 88.

¹²²Wichita Gas, etc., Co. v. Wright, 9 Kan. App. 730; 59 Pac. Rep. 1085.

¹²³Evans v. Keystone Gas Co., 148 N. Y. 112; 42 N. E. Rep. 513; 30 L. R. A. 651; 51 Am. St. Rep. 681; affirming 72 Hun. 503; 25 N. Y. Supp. 191; 28 Chic. L. News

160. See Rauck v. Cedar Rapids Gas Co., 116 Iowa —; 89 N. W. Rep. 88.

¹²⁴Rockford Gaslight and Coke Co. v. Ernst, 68 Ill. App. 300.

¹²⁵Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Armbruster v. Auburn Gaslight Co., 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158; Sierbrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Dow v. Winnepesaukee Gas Co., 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 509.

§636. Illuminating gas driving sewer gas into house.

If illuminating or natural gas is negligently permitted to escape into a sewer in such a quantity as to shove or drive sewer gas in the sewer into a house, and such sewer gas injure the inmates thereof, the gas company will be liable, although no illuminating or natural gas has ever entered such house; and the same would be true, of course, if such illuminating or natural gas did enter the house, but carried with it other gas that produced the damage.¹²⁶

§637. Explosion caused by act of third person.

The circumstances may be such that the company will be liable although the explosion is occasioned by the negligent act of a third person.¹²⁷ Thus where the servants of a city injured oil pipes and the leaking oil found its way to a sewer, and thence to a canal which flowed under a mill and was there exploded, to plaintiff's injury, the oil company was held liable.¹²⁸ So where gas escaped from a pipe which the company was bound to keep in repair, and a servant of a third person negligently set the gas, which had accumulated in his master's building, on fire; and the fire spread to the plaintiff's building, the company was held liable.¹²⁹ So where the plaintiff employed a gasfitter to place pipes in position in his house and connect them with the meter, whose servant went in search of escaping gas with a lighted candle, using the candle negligently, it was held that he could recover; and that it could not be said he had contrib-

See *Denniston v. Philadelphia Co.*, 1 Super. (Pa.) Ct. 599; 38 W. N. C. 332; 27 Pittsb. L. J. N. S. 14.

If other causes also operated to injure or kill the trees, the damages must be restricted to the injury the defendant did. *Rauck v. Cedar Rapids Gas Co.*, 116 Iowa —; 89 N. W. Rep. 88.

¹²⁶ *Hunt v. Lowell Gaslight Co.*, 8 Allen 169; 85 Am. Dec. 697.

¹²⁷ *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 493.

¹²⁸ *Lee v. Vacuum Oil Co.*, 54 Hun 156; 7 N. Y. Supp. 426.

¹²⁹ *Pine Bluff, etc., Co. v. McCain*, 62 Ark. 118; 34 S. W. Rep. 549; *Lebanon, etc., Co. v. Leap*, 139 Ind. 443; 30 N. E. Rep. 57.

uted to the injury, for he had no control over the servant.¹³⁰ And, as has been elsewhere discussed, the gas company is not excused where its mains are injured by a third person, so that gas escape, if it had notice of the injury and failed to promptly stop the flow of gas.¹³¹ In a case where a city engineer was superintending the construction of a sewer, and a gas main was so injured that gas escaped, entered a sewer, and the engineer, knowing the presence of gas in the sewer, entered it with a light which ignited the gas; it was held that the failure of the gas company to repair the pipe was the proximate and not the remote cause of the injury, and that the gas company was liable. "The calamity," said the court, "resulted from the defendant's negligence, and but for the defective pipe there would have been no escape of gas; and if this was not the proximate cause, where, we ask, was the intervening one by which the consequences of the accident are to be shifted from the defendant to some other person or thing?"¹³² In another instance the owner of a house notified a gas company to shut off his supply of gas, as he desired to discontinue its use. The company sent its servant to cut off the gas at the property line and take out the meter. The servant cut off the supply by means of a key nearly four feet in length, which he inserted in the gas box at the property line, and then went into the house and removed the meter, leaving the end of the supply pipe open. When he turned off the gas the servant left the key in the gas box, and did not remove it until after he had removed the meter and returned to the street. After leaving the house and before he reached the key again, some one, without his knowledge, turned on the gas by use of the key. Not more than ten minutes had intervened. The wife of the owner of the house, perceiving there was gas in the basement, went and opened

¹³⁰ *Burrows v. March Gas and Coke Co.*, L. R. 7 Exch. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

See where a thief with a candle caused an explosion, and the company was held liable, *Griffiths v. City of London Gas Co.*, 16 Gas J. 139.

¹³¹ *Smith v. Boston Gaslight Co.*, 129 Mass. 318; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653.

¹³² *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; 13 Repr. 253.

gasfitter, called by the plaintiff to put in pipes leading from the meter to the burners, negligently took a lighted candle for the purpose of finding out whence the gas proceeded; whereupon an explosion followed by reason of the contact of the gas with the candle flame, it was held that the plaintiff could recover damages for the injury to his house occasioned by the explosion, that the damages were not too remote, and that it could not be considered that the plaintiff contributed to the injury, for the workman was not under his control.¹³⁹ And in a New York case, where the pipe was broken by frost in consequence of its having been laid, by the defendant, too near the surface of the ground, from which gas escaped into the cellar, it was held that the plaintiff could recover damages caused by an explosion occasioned by a plumber, whom he had called to ascertain where the leak was, opening the cellar door, holding in his hand a lighted candle; and it made no difference that the plumber may have been guilty of negligence, for he was not the agent of the plaintiff so as to make the latter answerable for his negligence, for where a person sustains an injury from the separate negligence of two persons employed to do two separate things, he may maintain an action against both or either.¹⁴⁰ Where it was claimed by the defendant that the leak occasioned by the city officers not properly packing the earth under the pipe that broke in building a sewer, it was held that "the defendants, in managing a dangerous element, were bound not only to use due care on the part of themselves and their servants, but also to use due care to prevent injury from the careless or wrongful meddling with their works on the part of others; that they could not interfere with or prevent the city from building a sewer, but they had a right to and were bound to see that, in restoring the earth to its place, their own pipes

A contractor paving a street who negligently disturbs the gas mains, whereby the gas escapes, an explosion follows, and a passerby is injured, will be liable. *Fellwood v. Pearson*, 23 Gas. J. 248.

¹³⁹ *Burrows v. March Gas Co., L.*

R. 7 Exch. 96; L. R. 5 Exch. 67; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493; *Mersey Docks and Harbor Board v. Liverpool, etc., Co.*, 26 Gas J. 327.

¹⁴⁰ *Schermerhorn v. Metropolitan Gaslight Co.*, 5 Daly 144.

were properly supported, and, if injured, to see that the injury was repaired as soon as it could reasonably be done"; and that whether the defendant had exercised due care in these particulars was a question for the jury.¹⁴¹

§639. Negligence of fellow servant.

The rule in negligence cases with regard to fellow servants applies to gas explosions or leaks. Thus if a servant of a gas company, who was a fellow servant with the plaintiff, cause the explosion, there can be no recovery.¹⁴² In the case just cited there was really no negligence on the part of the company, for it had used proper appliances; but the explosion was occasioned by the act of a fellow servant in carelessly lighting a match near the escaping gas. The same rule was announced in a case where a fellow servant caused an explosion in a mine.¹⁴³ Where an employee of a gas company, under the direction of the company's superintendent, went into a trench to repair a leak in a gas main; and the superintendent approached with a lighted lantern, and the escaping gas ignited, causing an explosion; it was held that the action of the superintendent in approaching the trench with the lighted lantern was the proximate cause of the injury, and that under a statute providing that where the injury resulted from the negligence of any person in the service of a corporation to whose order or direction the injured employee at the time of the injury was bound to conform and did conform, the company was liable, the plaintiff could recover.¹⁴⁴ A similar result was reached where no statute seemed

¹⁴¹ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626.

A gas company is not liable when the injury is occasioned wholly by the neglect of a gasfitter, called by the property owner. *German American Ins. Co. v. Standard Gaslight Co.*, 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973.

If the explosion is occasioned by the superintendent of the company in searching for a leak with a light, the company will be liable.

Tipton Light, etc., Co. v. Newcomer (Ind. App.), 67 N. E. Rep. 548.

¹⁴² *Allegheny Heating Co. v. Rohan*, 118 Pa. St. 223; 11 Atl. Rep. 789; *Warren v. Wilder*, 20 Gas J. 892.

¹⁴³ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

¹⁴⁴ *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87; 54 N. E. Rep. 414.

to control it.¹⁴⁵ And in a case, not strictly in line with the subject matter of this section, where the action was against a chemical company for injuries sustained in inhaling fumes of nitric acid, the fact that the complaining person left his work, saying he could not endure it, and thereupon the superintendent assured him they would not hurt him, it was held that it was not shown that the employee so injured knew or had reason to know the fumes would do him a permanent injury, and that it was not negligence for him to return to work.¹⁴⁶

§640. Person on premises by license.

A gas company not only owes a duty to the owner of the premises and the inmates thereof, but also to all who are rightfully upon or rightfully come upon the premises, or who come there with the express or implied permission of the owner. This will include not only the servants of the owner, but all the servants of a contractor repairing or working upon the premises, all persons employed, whether by the day or by the piece, to work thereon or sent there by another to do work.¹⁴⁷ The rule is broad enough to include a guest of the owner of the premises.¹⁴⁸ The negligence of the owner in causing the explosion, where the gas company has also been negligent, will not defeat such person's right to recover, even though their combined negligence was required to cause an explosion.¹⁴⁹

¹⁴⁵ *Citizens' Gaslight and Heating Co. v. O'Brien*, 15 Ill. App. 400; affirmed 118 Ill. 174; *Citizens' Gaslight and Heating Co. v. O'Brien*, 19 Ill. App. 231; affirmed in *Citizens' Gaslight and Heating Co. v. O'Brien*, 118 Ill. 174; 8 N. E. Rep. 310.

¹⁴⁶ *Wagner v. Brew Chemical Co.*, 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 722, distinguishing *Beittenmiller v. Bergner, etc., Co.* (Pa.), 12 Atl. Rep. 599.

For a case where a servant of one company working for another

company did not raise the relation of fellow servant, see *Hatfield v. St. John Gaslight Co.*, 32 N. B. 100.

¹⁴⁷ *Washington Gaslight Co. v. Eckhoff*, 22 Wash. L. Rep. 656; 4 App. D. C. 174.

¹⁴⁸ *Defiance Water Co. v. Olinger*, 54 Ohio St. 532; 35 Ohio L. J. 323, 350; 44 N. E. Rep. 238; 32 L. R. A. 736. See note 150 of this section.

¹⁴⁹ *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; 32 N. E. Rep. 385; 18 L. R. A. 215; affirming 41 Ill. App. 34; *Richmond Gas Co. v. Baker*, 146 Ind. 600; 45 N. E. Rep.

§641. Guest or inmate of family may recover from gas company where owner is negligent.

A person making one of a family may recover for personal injuries occasioned by an explosion in the house, and is not chargeable with the negligence of the head of the family or owner of the dwelling, or of any member of the family with respect to the danger of gas escaping into the dwelling house.¹⁵⁰

§642. Lessee's right of action against the gas company.

The lessee or tenant has a right of action against the gas company for negligently permitting gas to escape upon the leased premises and injuring his possessory interest — as befouling a well — while the landlord must bring the action for any injury the reversion may sustain. If the act of the gas company made the enjoyment of the estate less beneficial, or in any way rendered it more expensive or inconvenient, without fault on his part, he is entitled to such damages as he has thus suffered.¹⁵¹

§643. Third person causing gas to escape, liability.

If a third person — one not connected with a gas company, and for whose act it is not liable — negligently cause gas to escape to the injury of a person, he will be liable to such person for all damages sustained. Thus where a municipality in constructing a sewer did the work in such a negligent manner as to

1049; 36 L. R. A. 683; *McGahan v. Indianapolis, etc., Co.*, 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355 (a plumber).

¹⁵⁰ *Richmond Gas Co. v. Baker*, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683. See case cited in note 148 of this section.

¹⁵¹ *Sherman v. Fall River Iron Works Co.*, 2 Allen 524.

The failure of the lessee to recover a judgment is no bar to the

lessor recovering a judgment for an injury to his interest in the property, — the action not being between the same parties nor between their privies. *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209.

Of course, for an injury to the person, the question of tenancy is not involved, though the injury occurs in the house the plaintiff has leased. *Otterback v. Philadelphia*, 161 Pa. St. 111; 28 Atl. Rep. 991.

cause the gas pipe to break for lack of support, whereby gas escaped into the plaintiff's house so as to cause an explosion, the municipality was held liable, and could not escape liability by delegating the construction of the sewer to a contractor.¹⁵² A natural gas company furnished a mill with gas. The pipes were arranged so that gas passed through a "regulator," which reduced the pressure before it reached the meter. There was a pipe, called a "by-pass," through which gas could be turned into the meter at the full pressure of the main. The owner had control of both the cock used to turn on the gas through the "regulator" and the one to turn it on through the "by-pass." The plaintiff entered the mill to seek work, and as he was leaving the mill owner, in turning on the gas, accidentally turned the cock admitting the full pressure. The result was that the meter exploded, injuring the plaintiff. It was held that the gas company was not liable; for the only negligence was that of the mill owner.¹⁵³

§644. Gas turned on by owner or stranger.

If the owner of the property or a stranger turn on the gas at the property line the gas company will not be liable to such owner for injuries occasioned by an explosion of the gas, thus turned on, occurring upon such property. The gas company has a right to control the turning on of gas; the stop-cocks at the property line is its own property, and under its control. The mere fact that the gas company did not object to the gasfitter putting pipes in a building for the owner to turn on the gas at the property line will not make it liable to such owner for an injury occasioned by an explosion occurring in the building because of the defective piping or failure to close up pipe ends. And there are two reasons for this: first, the gas company has no control over the piping within the building; and second, the

¹⁵² *Hardaker v. Idle Dist. Council* [1896], 1 Q. B. 335; 65 L. J. Q. B. (N. S.) 363; 74 Law T. Rep. 69; 44 W. R. 323; 60 J. P. 196.

¹⁵³ *Triple State, etc., Gas Co. v. Wellman (Ky.)*, 70 S. W. Rep. 49; 24 Ky. L. Rep. 851.

gasfitter is not its agent.¹⁵⁴ Nor is the gas company liable, although it otherwise would have been, for the act of a former employee turning on the gas, where the consumer requesting it to be turned on knew he was not then in the company's employ; and the fact that such person may have turned on the gas for other persons, in which the gas company acquiesced, does not make it liable, where the consumer knew he was not its employee.¹⁵⁵ Where a natural gas company had high and low pressure mains, controlled by valves securely enclosed in a box; and an employee of another natural gas company, desiring to take water out of the pipes of his company, opened the gas box by mistake and turned on the gas from the high pressure main to the low pressure main; and the gas, thus turned on, flowed into the pipes of a house supplied from such low pressure main, and bursted the gas fixtures, causing a fire and damages to the house; the gas company whose valves he had thus turned was held not liable, for its act had not caused the injury, and it had taken proper precautions to protect its valves from intermeddling. But the gas company whose employee had thus inadvertently turned the valves was held liable, although at the time he did so there was little gas in the high pressure main, it having been turned off to make needed repairs; and the fact that the company owning the mains may have been negligent in withdrawing the gas, or that the meter and regulators were out of order, was held to be no defense; for neither company could escape if the concurring negligence of both of them, if such was the case, produced the result.¹⁵⁶ But where the owner of a building requested the gas company to cut off his gas and remove its meter; and the company sent its employee, who cut off the gas at the street curbing with a key several feet long which he inserted in the gas box for that purpose and left there while he went into the house to remove the meter; and after he had removed the meter and before he reached the gas box — a period

¹⁵⁴ Flint v. Gloucester Gas and Light Co., 3 Allen 343.

¹⁵⁵ Flint v. Gloucester Gas and Light Co., 9 Allen 552.

¹⁵⁶ McKenna v. Bridge Water Gas Co., 193 Pa. St. 633; 45 Atl. Rep. 52; 47 L. R. A. 790.

of only a few minutes — some unknown meddling person turned on the gas again, of which fact the employee was ignorant; and shortly thereafter an injury was occasioned by the gas escaping from the end of the service pipe extending into the cellar, it was held that the gas company was liable for the act of the stranger, because of the fact of the employee's negligence in leaving the key in the position he did.¹⁵⁷

§645. Landlord's right of action against tenant.

There is no doubt that if a tenant carelessly or negligently cause an explosion of escaping gas in the house he is occupying, although he in no way caused the gas to escape, he would be liable to his landlord for the damages the house sustained; and much more so would he be liable if he caused the gas to escape.

§646. Tenant's right of action against landlord.

A tenant may have a cause of action against his landlord, where he has suffered a damage from escaping gas by reason of the latter's negligence. Thus where a landlord had the meter removed from the house, and the fixtures from the gas pipe, by a gas man, who left one of the pipes open and uncovered in an upper room, which was afterwards let to and occupied by his tenant; and the landlord subsequently gave the tenant of the lower floor permission to introduce gas into the house, which he did, without notifying the other tenant; and the gas pipes in the first tenant's apartment had been left open, by reason of which the room filled with gas, and when she entered the room with a candle an explosion occurred, injuring her greatly; it was held that the landlord was guilty of negligence, even though the direct cause of the accident was the negligence of the gas man

¹⁵⁷ Louisville Gas Co. v. Gutenkuntz. 82 Ky. 432. The question of neglect to close the end of the pipe does not seem to have controlled the case.

If a tenant turns on the gas, and

it damages the building, the landlord cannot recover damages for the injury from the gas company. Creel v. Charleston, etc., Gas Co. 51 W. Va. 129; 41 S. E. Rep. 174.

in not having sufficiently closed the fixtures.¹⁵⁸ But a landlord is not liable to an employee of his tenant for an injury resulting from an explosion of gas, caused by defective plumbing done by a former tenant of the building, who employed a competent plumber to do the work, in which the defects were not apparent and of which such landlord had no actual knowledge.¹⁵⁹

§647. Owner of premises liable to injured person.

The owner of the premises may himself be so guilty of negligence as to be liable to any one rightfully upon them who is injured by an explosion. Thus if gas be escaping in a dangerous quantity, and he knowing of the escaping gas and the extent of it, invite another on the premises, and does not warn him, and an explosion occurs whereby the person so invited is injured, such owner will be liable if he negligently caused the explosion. Where a servant of a water company went upon certain premises, in discharging his duty, to ascertain from a water meter the amount of water used by the owner of the premises, and was killed by an explosion of gas that had escaped, the owner of such premises was held liable; for the person killed was rightfully on the premises, being more than a licensee, under an implied invitation of the owner. The mere fact that the deceased smelled gas was considered not to be such contributory negligence on his part as should necessarily defeat him; for he was acting under the stress of a duty.¹⁶⁰

¹⁵⁸ *Kimmel v. Burfeind*, 2 Daly 155. The question of the plaintiff's due care was not considered.

Where the tenant has sued the gas company for an injury to his leasehold, and failed to recover judgment upon the merits of the case, such judgment is not a bar to the landlord recovering for an injury to his reversionary interest, the ac-

tion not being between the same parties nor their privies. *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209.

¹⁵⁹ *Metzger v. Shultz*, 16 Ind. App. 454; 43 N. E. Rep. 886, rehearing denied, 45 N. E. Rep. 619.

¹⁶⁰ *Finegan v. Fall River Gas Works*, 159 Mass. 311; 34 N. E. Rep. 523.

§648. Plaintiff must show due care on his part.—Contributory negligence.

The burden rests upon the plaintiff to show that he was acting with due care and with ordinary prudence when the accident occurred; or in other words, his act did not contribute to the injury. Ordinary care is all that is required of him; but, of course, what is ordinary care will depend upon the amount of danger and the extent of the plaintiff's knowledge of the danger.¹⁶¹ One has no right to expose himself to the mischievous effect of gas, and if injured, hold the gas company liable; and the burden rests upon him to show that he did not do so.¹⁶² If the plaintiff, by the exercise of diligence, could have prevented the injury, he cannot recover; and if the injury was a continuing one, and the company could have stopped the continuation of the loss if it had been notified of it, he cannot recover for any loss sustained after it became his duty to notify the company of such continuation, his act being considered as contributing to the loss sustained after the duty of informing the company has been imposed upon him.¹⁶³ Where the plaintiff's house was supplied with gas, but another company had a gas main ninety feet away from which gas escaped, which passing under the ground entered her cellar, and there exploded; and although plaintiff supposed the gas she detected was from the company's pipes that supplied her with gas, though she knew of the gas leak in the other company's main, yet it was held that she was not guilty of such contributory negligence as would defeat a recovery.¹⁶⁴

¹⁶¹ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233; *Lee v. Troy Citizens' Gaslight Co.*, 98 N. Y. 115; *Bartlett v. Boston Gaslight Co.*, 117 Mass. 533; 19 Am. Rep. 421; *Schmeer v. Gaslight Co.*, 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; *German American Ins. Co. v. Standard Gaslight Co.*, 67 N. Y. App. Div. 539; 73 N. E. Supp. 973. That is, where some statute does not change the rule as

to the burden of showing contributory negligence.

¹⁶² *Holly v. Boston Gaslight Co. supra.*

¹⁶³ *Hunt v. Lowell Gaslight Co.*, 1 Allen 343.

¹⁶⁴ *Consumers' Gas Co. v. Perrego*, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

Where gas was leaking into the plaintiff's cellar from a gas pipe and the company's superintendent

“The leak was across the street from appellee,” said the court. “She did not receive her gas from the appellant. It is hard, therefore, to understand how she should have thought that the leak at appellant’s sleeve, ninety feet distant, even if she knew its existence, which does not appear from the evidence, could have been the source of any danger to her.” Where the suit was to recover for injuries incurred from escaping gas, the plaintiff, to establish due care on his part, it was held could not prove that the gas company’s agent advised the occupants of a neighboring house, into which the gas had escaped from the same leak, what to do to avoid the ill consequences from it, and that he did the same things thus advised, if such agents gave him directions respecting the matter.¹⁶⁵

§649. Owner removing from his premises.

The circumstances may be such as to require the owner or occupants of a house to vacate it in order to avoid injury to himself; and if he do not he will be guilty of such contributory negligence as will bar a recovery. Thus where the plaintiff’s health was injured by inhaling gas escaping from a defective main in the street and entering his dwelling house, it was held to be a want of due care on his part to remain in the house, after he had a reasonable opportunity to procure another house or place of residence and to remove thither; and that the gas company could not properly be held liable in damages for consequences which ensued after such removal might have been made.¹⁶⁶ So where the plaintiff was a minor living with his father, and was injured by inhaling gas at night, which had escaped from a street main during the day previous, and of which the gas company was not notified until the afternoon, it

came to locate the leak, and plaintiff went into the cellar at his request, but remained no longer than was necessary to point out the place of the supposed leak, and, without warning her, the superintendent lighted a match, causing an explosion. it was held that the plaintiff

was not guilty of negligence contributing to the explosion. *Tipton Light, etc., Co. v. Newcomer* (Ind. App.). 67 N. E. Rep. 548.

¹⁶⁵ *Emerson v. Lowell Gaslight Co.*, 3 Allen 410.

¹⁶⁶ *Hunt v. Lowell Gaslight Co.*, 1 Allen 343.

was held that the plaintiff could not maintain his action if his father failed to adopt suitable precaution against the hurtful effect of the gas after it was discovered to be filling the house; and that it was for the jury to decide whether there was not a manifest want of prudence in remaining in the house after it became known to the inmates that it was being filled with gas,¹⁶⁷ Where a strong smell of gas prevailed throughout the dwelling house, and the gas company sent its servant to repair the leak, who, after professing that he had made the necessary repairs, informed the family that all was safe, and assured them that the odor of gas came from a gas post in the street, it was held not negligence on their part for the members of the family to remain in the house after receiving such assurance.¹⁶⁸ Of course, the rule is not so stringent as to require the occupant to leave the house as soon as he smells the escaping gas, for the odor may be slight, although unusual. But even though the amount be small, yet it may so accumulate as to render it dangerous, either by reason of an injury inflicted upon him by an explosion or to his health, to remain in the house; or the gas may escape in such volume as to require immediate action on his part. But he is not bound to remove before making a timely effort to stop the flow of escaping gas or to have the gas company stop it; unless it is clear, or there is a strong presumption, that it would be dangerous to remain longer in the house.¹⁶⁹ Of course, the removal here discussed is a removal of the person and not of his goods; for he is not bound to risk his health in removing them, and there is not, usually, much likelihood that they will be injured.

§650. Duty of property owner to cut off supply of gas.

The owner of the property must cut off the gas when discontinuing the supply, where the means of cutting it off is on his

¹⁶⁷ *Holly v. Boston Gaslight Co.*, 146 Ind. 600; 45 N. E. Rep. 1049; 8 Gray 123; 69 Am. Dec. 233.

36 L. R. A. 683.

¹⁶⁸ *Richmond Gas Co. v. Baker*,

¹⁶⁹ *Kibele v. Philadelphia*, 105 Pa. St. 41.

own premises, or at least within his buildings; and the gas company is under no duty to enter the building and cut off the gas in order that explosions may be prevented. Thus where the stop-cock was within the house, situated between the inner wall and the meter; and the last tenant, on removing, gave the usual notice that he did not require any further supply; and one of the gas company's workmen, at the tenant's request, removed the chandelier from one of the rooms, leaving the end of the pipe properly secured, the internal fittings being the property of the owner of the house; and while the house remained untenanted, the gas by some unexplained means escaped, an explosion occurred, and the house was injured; it was held that the company could not be held liable on the theory that it was its duty to cut off the supply of gas, but the property owner was guilty of contributory negligence for not having turned the stop-cock so as to shut off the flow of gas.¹⁷⁰ In another instance where the consumer was informed that the employee who had turned on the gas was not authorized to do so, that it was the duty of another employee to turn it on, that there was a leak in the regulators, and that it could not attend to the leak before the next morning, it was held that the failure of the consumer to turn off the gas on receiving this information of the defect was such negligence as precluded a recovery.¹⁷¹

§651. Searching for leaks with a light.

Courts will not say as a matter of law that it is contributory negligence to search for leaking gas with a lighted candle or by the use of matches. It is not negligence *per se* to thus search for escaping gas.¹⁷² Nor is taking a lighted lamp into a cellar filled with gas an act of contributory negligence, as a matter of law, which will preclude a recovery for injuries occurring ten

¹⁷⁰ *Holden v. Liverpool Gas Co.*, 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

¹⁷¹ *Kohler Brick Co. v. N. W. Ohio, etc., Gas Co.*, 11 Ohio Cir. Ct. 319; 5 Ohio Cir Dec. 379.

¹⁷² *Pine Bluff, etc., Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; *People's Gas-light and Coke Co. v. Amphlett*, 93 Ill. App. 194.

minutes later, although the person injured knew at the time he took the light into the cellar that it was filled with gas.¹⁷³ In such instances the question of contributory negligence in thus searching for escaping gas is one for the jury.¹⁷⁴ And where the tenant of the plaintiff having smelt escaping gas, which he reasonably supposed proceeded from the furnace, and under that impression went with a lighted candle into the cellar to examine such furnace, it was held that there was not such contributory negligence as prevented a recovery for the damages occasioned by an explosion, the candle having come in contact with gas escaping from the defendant's pipe.¹⁷⁵ "The other ground of defense, as to the contributory negligence of the plaintiff's intestate," said the court in one case, "we do not think should be taken from the jury. Sometimes it is extremely dangerous to take a light to discover the location of a gas leak, and sometimes it is not, depending upon various circumstances; among others, upon the extent of the leak, the size of the enclosure where located, and the length of time the leak has existed. The plaintiff's intestate, a boy of 18, took a candle, with the statement that he had seen gas men take a candle to find a leak, and it is a fact that they do so upon some occasions. The whole case as to the contributory negligence of plaintiff's intestate should be submitted to the proper judges of fact."¹⁷⁶ Searching for leaking gas with a lighted taper, by the house owner who discovers the escape of gas after a plumber employed to put in gas fixtures has left, is not contributory negligence *per se*, but whether or not there is such negligence is a question for the jury.¹⁷⁷ If the gas is escaping in large quantities, the court

¹⁷³ Consolidated Gas Co. v. Crocker, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785.

¹⁷⁴ Scheemer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; Pine Bluff, etc., Co. v. Schneider, *supra*; German American Ins. Co. v. Standard Gaslight Co., 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973.

¹⁷⁵ Bartlett v. Boston Gaslight Co., 122 Mass. 209.

¹⁷⁶ Scheemer v. Gaslight Co., *supra*.

¹⁷⁷ Plouk v. Jessop, 178 Pa. St. 71; 27 Pittsb. L. J. (N. S.) 162; 39 W. N. C. 156; 35 Atl. Rep. 851. In this case the plaintiff noticed leaking gas, but the plumber assured him that "everything is right"; and after he had left the plaintiff, still noticing it, took a lighted candle and searched for it, as he had seen the plumber do it.

may possibly say that it was contributory negligence to search for the leak with a lighted taper.¹⁷⁸ If the owner of the premises employ a plumber, the act of the plumber in entering a cellar with a lighted candle to locate a leak does not prevent such owner recovering damages occasioned by an explosion.¹⁷⁹ Where an inspector of water meters went to a shed to examine a water meter therein on the gaslight company's premises, and was assured by the company's officers, who were present, that there was no danger, although he detected gas that had escaped, and demonstrated the fact by lighting matches themselves; it was held that he was not precluded from recovering damages on the ground of contributory negligence, although he apprehended danger when making the examination. The act of the officers of the gas company had lulled his suspicions; and he had a right to rely upon their statements.¹⁸⁰ So where a laborer was ordered by his superior to enter a still and repair it, and was killed by an explosion of gas which had entered for lack of a stop-cock, and which was ignited by a lighted candle he was carrying, it was held that the company was liable, although it was almost absolutely certain that gas from the other stills nearby in use would turn back into the empty still, in the absence of a stop-cock. It was said that he did not assume the risk; for he had a right to rely upon the duty of the master to furnish him a reasonably safe place within which to work.¹⁸¹ But to take a lighted candle to a place where it is known that gas in a considerable quantity is escaping, is such an act of negligence as will prevent a recovery for damages occasioned by the gas exploding by reason of its coming in contact with the light.¹⁸² In commenting upon the last two cases cited, the Supreme Court of Maryland pointed out the distinction between them and those cases where it was held not to be con-

¹⁷⁸ *Pine Bluff, etc., Co. v. Schneider, supra.*

¹⁷⁹ *Schermerhorn v. Metropolitan Gaslight Co.*, 5 Daly 144; *Parry v. Smith, L. R.* 4 C. P. Div. 325; 33 *Gas J.* 899.

¹⁸⁰ *Washington Gaslight Co. v. Eckoff*, 7 App. Cas. D. C. 372.

¹⁸¹ *Nichols v. Brush, etc., Co.*, 53 Hun 137; 6 N. Y. Supp. 601.

¹⁸² *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; 13 Rep. 253; *Lanigan v. Gaslight Co.*, 71 N. Y. 29.

tributory negligence to use a light in searching for gas: "In these cases where the explosion instantly followed upon a light being brought in contact with the gas, and there could be no possible dispute that the bringing of the light in contact with the gas caused the explosion; but when there is not such a connection between the act of entering the house with a lighted lamp and the explosion of gas as to establish with a certainty and to the exclusion of any other reasonable hypothesis, the relation of cause and effect, the question as to what caused the explosion is for the jury to solve under proper instructions from the court. When, therefore, as here, more than ten minutes intervened between the time the lamp was taken into the cellar and the time the subsequent explosion occurred, and when, as here, the lamp itself was uninjured, it would be impossible for the court to assume that the lighted lamp caused the explosion, and to rule, as a conclusion of law, that the plaintiff's employees were guilty of contributory negligence in taking the lamp into the cellar; this is true also with respect to the lighting of matches to ignite the gasoline in the stove."¹⁸³ Where gas escaped into a sewer from a defect in a pipe, and the plaintiff, a civil engineer, entered the sewer, whereupon an explosion followed, it was held that there could be no recovery, the court saying: "The gas company was responsible for what might, in the nature of things, occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible. The gas pipe and sewer were in the immediate vicinity of each other. In the former was a defect, and from it the gas, not merely by absorption or by gravity, but also by pressure, found its way into the sewer. This certainly resulted from the defendant's negligence, because but for the defective pipe there could have been no escape of gas. But the plaintiff was also bound to the exercise of a reasonable care for his own safety. He was a civil engineer, and may be presumed to have had some knowledge of the dangerous nature of illuminating gas, of its power to penetrate the earth, and of its explosive character when

¹⁸³ Consolidated Gas Co. v. Crocker, *supra*.

mixed in certain quantities with common air. The defendant was bound for the consequences of its neglect, though these consequences were not and could not by ordinary prudence have been anticipated, whilst the plaintiff was bound only to a knowledge of the probable consequences of the fact which he was cognizant, and to that ordinary prudence which the consequences required."¹⁸⁴

§652. Contributory negligence a question for the jury.

Whether or not the plaintiff has been guilty of such negligence as contributed to the injury is a question for the jury, under the instructions of the court.¹⁸⁵ Where the charge was injury to the plaintiff's health by gas escaping into the house, it was held to be a question for the jury whether remaining in the house after a knowledge that gas was escaping was not a manifest lack of prudence.¹⁸⁶ And where the charge was that gas escaped into the barn and killed plaintiff's horse, it was held a question for the jury to determine whether he was guilty of contributory negligence in leaving the horse in the barn after discovering the odor of gas, the odor not being so strong as to possibly impress upon him a sense of actual danger.¹⁸⁷

¹⁸⁴ *Oil City Gas Co. v. Robinson, supra.* See *Sauvage v. English Gas Co. of Paris*, 4 Gas J. 136 (a French case); *Vallee es qualite v. New City Gas Co.*, 7 Am. Law. Rev. 767; *Brown v. New York Gaslight Co.*, — *Anthon's N. P. Cas.* 351; *Parkin v. Wirksworth Gas Co.*, 26 Gas J. 496.

Perhaps if the gas be accidentally lighted there may be a recovery. *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209.

It is not negligence for the owner of a house to leave a house vacant for nearly a month without inspection. Where a house was thus left vacant, and an odor of gas was discovered in and about it, and the neighbors called a policeman, who,

in searching for the place of the escape of the gas, presented a lighted candle at an opening, causing an explosion, it was held that the negligence was not the negligence of the owner. *Baltimore Consolidated Gas Co. v. Getty (Md.)*, 54 Atl. Rep. 660.

¹⁸⁵ *Kibele v. Philadelphia*, 105 Pa. St. 41; *Ottersbach v. Philadelphia*, 161 Pa. St. 111; 28 Atl. Rep. 991; *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233.

¹⁸⁶ *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233. See *Hunt v. Lowell Gaslight Co.*, 1 Allen 343.

¹⁸⁷ *Lee v. Troy, etc., Co.*, 98 N. Y. 115.

To defeat the plaintiff, his contributory negligence must contribute materially and essentially to the injury; and the jurors are the judges of this question.¹⁸⁸ The conduct of the parties may be shown, in order that the jury may determine whether or not the plaintiff neglected to use ordinary care in seeking relief or resorting to expedients readily available for his own protection and security.¹⁸⁹ Where the deceased was killed by inhaling gas, but the evidence showed that he was under certain stress of duty, it was held to be a question for the jury whether the risk run did not seem to be great, and if there had been ventilation would not have been great; and for that reason he could have taken the risk without releasing the defendant by his contributory negligence.¹⁹⁰ An inspector of a water company went upon the premises of a gas company to examine a gas meter. The meter was in a shed, and the officers of the gas company assured him that there was no danger in taking a lighted candle into the shed, and demonstrated the fact by themselves lighting matches first. He was injured by an explosion of gas that had accumulated in the shed. It was held that the fact the inspector had apprehended danger was not conclusive evidence of contributory negligence on his part, but the question was one for the jury.¹⁹¹

§653. Negligence of parent, wife or servant.

In those jurisdictions where the negligence of the father or mother is allowed to defeat the right of his minor child to recover damages caused by the inhaling of gas or its explosion, the child must show not only that it was free from contributory

¹⁸⁸ Oil City Fuel Supply Co. v. Boundy, 122 Pa. St. 449; 15 Atl. Rep. 865; Lanigan v. New York Gaslight Co., 71 N. Y. 29.

¹⁸⁹ Holly v. Boston Gaslight Co., *supra*.

¹⁹⁰ Finnegan v. Fall River Gas Works Co., 159 Mass. 311; 34 N. E. Rep. 523; Citizens' Gaslight, etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

¹⁹¹ Washington Gaslight Co. v. Eckloff, 7 App. D. C. 372.

Where a city caused breaks in gas pipes in digging a sewer, it was held that the owner of a cellar in which an explosion occurred could not have anticipated that the escaping gas would follow an old sewer into his cellar. Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493.

negligence, but also its father or mother; and a want of ordinary care of the father or mother will defeat its cause of action.¹⁹² But it has been held that negligence on the part of the parent which partly occasioned the accident was not such negligence as would defeat its cause of action; and that negligence which would not defeat an adult was not such as would defeat a minor.¹⁹³ Where the evidence in a case showed that the mother and her infant child, who was the plaintiff, slept together in a room without gas fixtures, and in the morning the mother was found dead and the child insensible, and there was an entire absence of evidence to show that either the mother or child knew of the escape of gas, or was conscious of its presence, in time to leave or take precautions against or prevent its effect by opening the windows; and it was shown that the mother was a sober and prudent woman; and that on the day before there was no smell of gas in the street, it was held that the evidence showed due care on the part of the child.¹⁹⁴ The negligence of the husband or his servant acting under his directions will bar the right of the wife to recover.¹⁹⁵ So the negligence of the plaintiff's servant will bar his (the plaintiff's) right to recover; as where he went with a lighted candle to search for escaping gas.¹⁹⁶ So, again, the negligence of the deceased will bar his representatives.¹⁹⁷ But where the deceased was a servant, and was directed to go to the place by the use of a ladder of a certain length, but selected one much shorter; it was held that he was bound to select the course which was farthest from danger, and if there was any difference in the two ways, it was a question for the jury to determine if he deliberately chose the most dangerous one.¹⁹⁸

¹⁹² *Holly v. Boston Gaslight Co.*, 8 Gray 123; 69 Am. Dec. 233.

¹⁹³ *Lannen v. Albany Gaslight Co.*, 46 Barb. 264; affirmed 44 N. Y. 459.

¹⁹⁴ *Smith v. Boston Gaslight Co.*, 129 Mass. 318.

¹⁹⁵ *Vallee es qualite v. New City Gas Co.*, 7 Am. Law Rev. 767. Hus-

band sent a servant to search for gas, who took a lighted candle.

¹⁹⁶ *Pine Bluff Water and Light Co. v. Schneider*, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366.

¹⁹⁷ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

¹⁹⁸ *Citizens' Gaslight, etc., Co. v. O'Brien*, 118 Ill. 174; 8 N. E. Rep. 310.

**§654. Contributory negligence of tenant may bar landlord,—
reversionary interest.**

The negligence of the tenant will bar the landlord recovering for damages to his property caused by an explosion.¹⁹⁹ Thus where gas escaped from a street main into a house, and the tenant going in search of the escaping gas with a lighted candle caused an explosion, it was held that if he was negligent, thus causing the explosion, the landlord could not recover for injuries to his house. "If the tenant," said the court, "upon discovering the presence of gas in a large quantity in the house, neglected to give notice to the agents or servants of the gas company, or take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects which would not have followed but for such reckless or negligent conduct on his part, the gas company ought not to be held responsible for those results. If the intervening misconduct of the occupant of the building produced the explosion, which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the gas company."²⁰⁰ But if the tenant was not guilty of any negligence, then, of course, the landlord could recover damages from the gas company. In such an event the landlord has the burden to show that the injury was caused by the gas company's negligence; that the tenant's negligence did not materially contribute to the injury, in addition to showing that his own act did not contribute to it; and that the tenant, if he discovered the presence of gas, took reasonable means and precautions to remove and exclude it, or, if he had no knowledge of what precautions should have been taken, he made proper efforts to notify the gas company. If the tenant accidentally ignited the gas, or if he reasonably supposed the gas proceeded from another source, as from a furnace, and under that impression went in search of it with a light, thus causing an explosion,

¹⁹⁹ Creel v. Charleston, etc., Gas Co., 51 W. Va. 129; 41 S. E. Rep. 174. ²⁰⁰ Bartlett v. Boston Gaslight Co., 117 Mass. 533; 19 A. Rep 421.

the landlord may recover for the damages occasioned his house by the explosion.²⁰¹

§655. Negligence of contractors.— Lessee.

A gas company cannot escape liability by simply placing the management of its gas works in charge of a person called a "lessee."²⁰² But there is no doubt that the company would not be liable if it had made an actual lease of its plant, and surrendered all control over it. Where a contractor had not yet turned over to the gas company the plant, including the mains in the street, he was constructing for it; and gas escaped because the mains were not securely connected with each other, the gas company was held liable. As to third persons the contractor was regarded as the agent of the gas company, on the ground that the right to lay and put down gas mains in the street was a permission from the municipality and the exercise of a right under its charter; and therefore the gas company could not escape liability of letting the contract to an independent contractor. In passing on the case the court used the following language: "Even though the person who causes the injury is a contractor, he will be regarded as the servant or agent of the corporation for which he is doing the work, if he is exercising some chartered privilege or power of such corporation with its assent which he could not have exercised independently of the charter of such corporation. In other words, a company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its charter powers of persons to whom it has permitted their exer-

²⁰¹ Bartlett v. Boston Gaslight Co., 122 Mass. 209. See Sherman v. Fall River Iron Works Co., 2 Allen 524.

It cannot be said as a matter of law that a tenant of a flat, who perceives the odor of escaping gas, enters an adjoining vacant apartment without permission, lights a match to aid him in ascertaining the

source of the escaping gas, causing an explosion by which he is injured, has contributed to his injury to the extent that he is barred from recovering damages. People's Gaslight and Coke Co. v. Amphlett, 93 Ill. App. 194.

²⁰² Consolidated Coal Co. v. Seninger, 79 Ill. App. 456, affirmed 179 Ill. 370.

cise.”²⁰³ But a result diametrically opposite to this decision was reached in another State; and in passing on the case the court used the following language: “It is to be regretted that corporations invested with the right of appropriating private property and entering the public highways for the purpose of laying their pipes in which to transport and distribute one of the most dangerous natural agencies in existence should be permitted to relieve themselves from the duties and responsibilities of business by letting part of the work requiring the highest degree of care to an independent contractor, but the law is so settled.”²⁰⁴ Where the plaintiff was a butler in the employ of a club, and defendant had been employed by the club to make alterations in the club house, and he had contracted with a gasfitter to do the gas fittings, which he did; it was held that if the gasfitter laid down any pipe not specified in his contract with the defendant, and by reason of a defect in such pipe the gas escaped, the defendant was not liable; and it was also held that even if the pipe was included in the contract, and the gas had been turned on by the plaintiff’s own order while the defendant’s men were in the house, the house being unoccupied and not completed, that the plaintiff could not recover.²⁰⁵

²⁰³ *Economic Fuel Gas Co. v. Myers*, 168 Ill. 139; 49 N. E. Rep. 66; affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276. A similar decision is *Hardaker v. Idle Dist. Council* [1896], 1 Q. B. 335; 65 L. J. Q. B. (N. S.) 363; 74 Law. T. Rep. 69; 44 W. R. 323; 60 J. P. 196. For other cases to same effect, see *Gray v. Pullen*, 5 B. and S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257; *Woodman v. Metropolitan, etc., Co.*, 149 Mass. 335; 21 N. E. Rep. 482; 4 L. R. A. 213; *Denning v. Terminal Ry.*, 49 N. Y. App. Div. 493; 63 N. Y. Supp. 615; *Vosbeck v. Kellog* (Minn.), 80 N. W. Rep. 957; *Holliday v. Nat. Telephone Co.*, 68 L. J. Q. B. 1016; 81

L. T. 252; 47 W. R. 658; 15 T. L. R. 483; [1899] 2 Q. B. 392.

²⁰⁴ *Chartiers Valley Gas Co. v. Lynch*, 118 Pa. St. 362; 12 Atl. Rep. 435; *Chartiers Valley Gas Co. v. Waters*, 123 Pa. St. 220; 16 Atl. Rep. 423; 25 Am. and Eng. Corp. Cas. 400. See *Phœnix, etc., Co. v. Dethick*, 14 Gas J. 536.

A gas company by permitting a consumer to employ a person to put in a gas pipe and turn on the gas, does not make such person its agent, so as to render it liable for an explosion caused by his negligence. *Flint v. Gloucester Gaslight Co.*, 3 Allen 343.

²⁰⁵ *Rapson v. Cubitt*, 9 Mess. & Wels., 710; C. and M. 64.

§656. Right of action over.

The fact that a gas company has been compelled to pay damages because of its negligence will not always bar its right to recover from the person guilty of the original act that led on to the negligent conduct of the company. Thus, where it appeared from the evidence that an explosion was occasioned by gas leaking from a broken pipe of the plaintiff gas company, and that judgments had been recovered against it by the parties injured, from which appeals had been taken which were subsequently compromised; it was held that the gas company could recover from the traction company the damages it had sustained by reason of the negligence of the latter in excavating the street and causing the breaking of its pipe, in an action of trespass brought to recover the money paid by it for the injuries caused by the negligence of such traction company.²⁰⁶

§657. Liability of gasfitter.

If a gasfitter, in fitting up a house, put in defective pipes; or if in repairing those already in, he repairs them defectively, and thereby gas escape and injure the inmates, or explodes, injuring the house, he will be liable for the damages sustained, the same as where a gas company negligently permits gas to escape.²⁰⁷

§658. Evidence to show due care on gas company's part.

The defendant gas company may always show that it had used due care to prevent leaks or explosions, and for that pur-

The action for damages incurred from the operation of a plant is properly brought against the person operating it, although another person defectively erected such plant. *Hyde Park, etc., Co. v. Porter*, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152.

²⁰⁶ *Philadelphia Co. v. Central Traction Co.*, 165 Pa. St. 456; 30

Atl. Rep. 934. See *District of Columbia v. Washington Gaslight Co.*, 9 Mackey 39; 161 U. S. 316.

²⁰⁷ *Parry v. Smith*, L. R. 4 C. P. Div. 325; 33 Gas J. 899; *Hemstead v. Phoenix Gaslight, etc., Co.*, 3 H. and C. 745; 11 Jur. N. S. 626; 13 W. R. 662; 34 L. J. C. P. 108; 14 Gas J. 399.

pose it may show that it had used proper material in the construction of its plant; that it had used proper pipes or mains, where the charge is that they had become weak and rotten from long use or from the effect of the elements upon them.²⁰⁸ And where the charge is that it negligently permitted the gas to escape after it had notice that it was escaping, the company, to show due diligence on its part, may show its system of complaints for leaks, and what was its course of business with regard to such complaints, for the purpose of showing that due preparation for accidents had been made by it, but not for the purpose of showing that it had exerted the same degree of diligence it did in the case as it had done in other cases.²⁰⁹ In one case it was held that the original entries in the gas company's books of leaks and repairs along the line of pipe for five months prior to the explosion where it was charged the leak occurred were competent, as tending to show that the company had provided an adequate system for the protection of the public from the unusual danger of escaping gas.²¹⁰ Copies of notices sent by the gas company to consumers calling attention to the liability of leaks to occur from the excavations being made in the streets by the city or various construction companies within a year or so prior to the accident complained of, are admissible on the question of due care on the part of the gas company.²¹¹

²⁰⁸ Consumers' Gas Trust Co. v. Corbaley, 14 Ind. App. 549; 43 N. E. Rep. 237.

²⁰⁹ Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233.

²¹⁰ Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183; Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

The rules of boards of fire underwriters and other electric light companies, prescribing the manner of wiring buildings, are inadmissible evidence on an issue whether an electric light company had defectively insulated its wires in a building.

Dechert v. Municipal, etc., Co., 57 N. Y. Supp. 225.

²¹¹ Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

Where the gas escaped from a street main, passed under the frozen crust of the surface of the ground into the plaintiff's cellar, a witness, experienced in digging holes through the frozen earth, was allowed to testify how much labor it would take to dig such holes as had been dug by the gas company through the frozen earth in search for the leaks, in order to show whether it had used reasonable dili-

§659. Expert evidence to show effect of electrolysis.

Where the question arises that the defects in the gas mains or pipes were caused by electrolysis, experts may be called to show what effect electricity has upon gas mains or pipes, and its tendency to destroy the iron fibre and render them unsafe, and to give their opinions that the pipes were affected by electrolysis, and the reasons for their opinions.²¹³

§660. Evidence in cases of inhalation of gas.

In an action to recover damages occasioned by the inhalation of gas, aside from the question of an expert evidence, it may be shown that the plaintiff and other members of his family living with him had been in good health until the influx of gas; and that after that they all became ill, or even some of them died.²¹³ No particulars, however, of the sickness of the other members of the family are admissible to show the nature of the gas and its effects upon such other members, who inhaled it at the same time with the plaintiff.²¹⁴ Nor is it admissible to show that wherever the gas entered a house in the neighborhood, where their drains were connected with the sewers through which the gas escaped into the plaintiff's house, sickness followed.²¹⁵ Nor can it be shown that gas escaped into a block of houses directly opposite plaintiff's house, in order to charge the defendant with notice of the leak, before it is shown it came into the plaintiff's.²¹⁶ Where the plaintiff's theory is that the gas escaped into a sewer, and thence through the house drain into his house, it may be shown that it entered other houses similarly connected with the same sewer, or with a sewer entering into the sewer into which it is claimed it

gence in finding and stopping the leak. *Emerson v. Lowell Gaslight Co.*, 3 Allen 410.

²¹² *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183.

²¹³ *Hunt v. Lowell Gaslight Co.*, 1 Allen 343; *Hunt v. Lowell Gaslight Co.*, 8 Allen 169; 85 Am. Dec. 697. See *Beyer v. Consolidated Gas*

Co., 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628.

²¹⁴ *Hunt v. Lowell Gaslight Co.*, 8 Allen 169; 85 Am. Dec. 697.

²¹⁵ *Hunt v. Lowell Gaslight Co.*, 3 Allen 410.

²¹⁶ *Emerson v. Lowell Gaslight Co.*, 6 Allen 146; 83 Am. Dec. 621. But see *Apfelbach v. Consolidated Gas Co. (Pa.)*, 54 Atl. Rep. 359.

escaped.²¹⁷ The gas company may not introduce evidence to show that plaintiff's sickness and his family's was in fact typhoid fever, that earlier occupants of the house had been afflicted with much illness of the same character, that several families had been compelled to recover from it on that account, and that its location was low, upon made land, and it was generally regarded to be unhealthy.²¹⁸ It may be shown that gases were set in motion by the illuminating or natural gas escaping into the sewer where they were, and that they were pushed into the plaintiff's house, causing illness of which complaint is made.²¹⁹ If the charge be that the company's escaping gas caused the death of the plaintiff's child, the plaintiff must show not only the negligence of the child, the fact that the death was due to it, and that neither he nor the child contributed to it, where the plaintiff is required to show his freedom from contributory negligence.²²⁰ In the case just cited, the child was found dead in a cellar, the gas escaping from a leak in a joint of the gas pipe, which had never leaked before and around which the plaintiff had just caused a load of coal to be thrown; but the physician could not say that its death was due to the inhalation of gas; and it was held that an instruction to find for the gas company was proper.²²¹ Evidence

²¹⁷ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; 18 Alb. L. Jr. 372. *Ottawa Gaslight and Coke Co. v. Graham*, 35 Ill. 346.

²¹⁸ *Hunt v. Lowell Gaslight Co.*, 1 Allen 343.

²¹⁹ *Hunt v. Lowell Gaslight Co.*, 8 Allen 169; 85 Am. Dec. 697.

As to what is sufficient to show due care on the part of the plaintiff who has breathed the gas while asleep, see *Smith v. Boston Gaslight Co.*, 129 Mass. 318, cited elsewhere, and *Shogland v. St. Paul Gaslight Co.* (Minn.), 93 N. W. Rep. 668.

²²⁰ *State v. Consolidated Gas Co.*, 85 Md. 637; 37 Atl. Rep. 263. See

Apfelbach v. Consolidated Gas Co. (Pa.), 54 Atl. Rep. 359.

²²¹ It may be shown that the plaintiff for a long time — as, for two years — made no claim for damages. *Emerson v. Lowell*, 3 Allen 410.

The master is not liable for injuries to his servant from exposure to poisonous gases generated by coal fires in his shop, whose effect is enhanced by the admission of extreme cold air, where he is ignorant of the unwholesome and dangerous condition of the building, and could not, by the exercise of ordinary care, have known of the danger. *Maitland v. C. L. & R. R. Co.*, 3 Ohio Leg. News. 289.

is admissible, in case of an injury from inhaling gas, to show that when artificial respiration was resorted to the odor of gas coming from the lungs was perceptible.²²²

§661. Expert evidence on inhalation of gas.

Where the action is to recover damages caused to the plaintiff or his intestate by the inhaling of gas that had been negligently released, or permitted to escape, testimony of physicians to show the effect upon the health or system of the plaintiff or the intestate is admissible; and they may testify whether or not the breathing of the gas produced the particular sickness it is claimed to have done.²²³ But a physician who had been in practice for several years, without any experience concerning the effects upon the health by breathing illuminating gas, was held not to be qualified to testify in relation thereto as an expert, and experience gained from attending upon other persons made ill by breathing gas from the same leak was not sufficient to qualify him to testify, nor was he permitted to testify that the plaintiff had told him that gas entered his house a year or

The owner of a blast furnace is not liable to his servant for injuries received by the inhalation of gas not sufficient in quantity to affect an ordinary individual,—as, where his lungs are over-sensitive from a previous illness, if such master had no reason to suppose he was not sufficiently strong to endure the gas without risk. *Parlin, etc., Co. v. Finfrouck*, 65 Ill. App. 174.

For instance where the conduct of the superintendent in quieting the fears of the servants were enough to prevent the defense of contributory negligence, see *Wagner v. H. W. Jayne Chemical Co.*, 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 772.

²²² *Merneilley v. Employers', etc., Corp.*, 148 N. Y. 596; 43 N. E. Rep. 54; 31 L. R. A. 686.

External injury in an action to recover damages occasioned to the person by an explosion of gas need not be shown. *Fellwood v. Pearson*, 23 Gas J. 248. The fact of actual injury is a question for the jury.

Damages for a severe shock occasioned by an explosion may be recovered. *Fellwood v. Pearson, supra*.

²²³ *Hunt v. Lowell Gaslight Co.*, 8 Allen 169; 85 Am. Dec. 697.

Evidence that the plaintiff did not claim any damages for more than two years after the injury is admissible; but evidence that the plaintiff, while sick in bed from the effects of the gas, did not ascribe it to the effects of the gas or say anything as to the cause of it, is not admissible. *Emerson v. Lowell Gaslight Co.*, 3 Allen 410.

so before, and that the inhalation of it made him sick.²²⁴ And in this same case it was held that the evidence of an agent of the company in charge of its gas works, who did not know or believe gas was noxious to health, was not admissible for the purpose of affecting the question of care and diligence which it was the duty of the company to exercise, but it was held that he was competent to give his opinion upon the general question as to the alleged deleterious effect of gas upon the health of persons exposed to it.²²⁵ The plaintiff may, however, show all the facts and circumstances attending his sickness, to which may be added the opinions of skilled and experienced persons as to the cause which produced it; and the opinion may be taken as to whether or not it might have been or probably was produced by the gas to which plaintiff was exposed in his house.²²⁶ So expert evidence is admissible to show that hard coal burned in a generator would produce carbonic acid gas and carbonic oxide, that both are poisonous, and the former, because it is higher than air, would ascend to the ceiling, in order to show the presence of gas at the place where the victim fell; but he may not be asked if gas was present at such place, being only permitted to say that if such gas escaped it would have a tendency to go to the place where the deceased fell.²²⁷ And a witness having no practical experience, all his knowledge having been acquired from reading standard authorities and study, may testify as to the effect of gases from hard coal on the human being.²²⁸

§662. Proof of effect upon growing vegetation or grass.

In order to determine whether or not gas escaped to the injury of the plaintiff, it may not only be shown that the odor

²²⁴ *Emerson v. Lowell Gaslight Co.*, 6 Allen 146; 83 Am. Dec. 621.

²²⁵ *Ibid.* *Emerson v. Lowell Gaslight Co.*, 3 Allen 410.

²²⁶ *Emmerson v. Lowell Gaslight Co.*, *supra*.

²²⁷ *Citizens' Gaslight, etc., Co. v.*

O'Brien, 15 Ill. App. 400; affirmed 118 Ill. 174.

²²⁸ *Citizens' Gaslight, etc., Co. v. O'Brien*, 15 Bradw. 400.

Such a witness may be asked what practical experience he has had with such gases. *Citizens' Gaslight,*

of gas was perceptible²²⁹ at the point in controversy, but its extent or amount,²³⁰ the discoloration of the ground or earth caused by it,²³¹ and also the effect upon vegetation or grass; and in order to show the effect, the state of the vegetation before the leak occurred, during the time the gas was flowing, and after it ceased to flow may be shown.²³² Thus proof of the decay of vegetation, its death, together with the leakage of a large amount of gas after the gas main was laid and until it was recalked, the healthy growth of the vegetation after such recalking, will support the conclusion of the jury that the escape of the gas was the cause of the injury to the vegetation.²³³

§663. What acts of negligence a question for the jury.

It is impossible to lay down any general rule with reference to what acts or admissions shall be determined by the court and what by the jury as instances fixing a liability upon those guilty of them. In instances of leaks and explosions the general rules of negligence apply, the only confusion being that which arises out of their application to particular instances. Illustrations have already been given; and further illustrations must necessarily be little more than a digest of the cases. Where premises had been vacant several weeks, of which fact the gas company had due notice, and had been requested to cut off the gas supply; and on the evening of the explosion they were let to some negroes; and it appeared that the company had cut off the gas by the meter cock, but not by the service cock, which was under the curbstone; that some one had tam-

etc., *Co. v. O'Brien*, 118 Ill. 174; 8 N. E. Rep. 310.

²²⁹ *Koplan v. Boston Gaslight Co.*, 177 Mass. 15; 58 N. E. Rep. 183.

²³⁰ *Emerson v. Lowell Gaslight Co.*, 3 Allen 410.

²³¹ *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; *Bloomfield, etc., Co. v. Calkins*, 1 T. and C. (N. Y.) 549.

²³² *Siebrecht v. East River Gas Co.*, 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; 18 Alb. L. Jr. 372

²³³ *Evans v. Keystone Gas Co.*, 148 N. Y. 112; 42 N. E. Rep. 513, 28 Chic. Leg. News. 160; 30 L. R. A. 651; 51 Am. St. Rep. 681; *affirming* 21 N. Y. Supp. 191.

pered with the meter cock and let the gas on, cutting it off again; and if the gas had been cut off at the service cock there would have been no explosion, it was held that it was a question for the jury whether the gas company was guilty of negligence, or whether the accident happened in consequence of the negligence of the plaintiff or his tenant. A non-suit was held to be erroneous.²³⁴ Where the explosion was alleged to have been occasioned by a gasfitter called to make a connection, who, it was claimed, did so without turning off the gas, it was held to be a question for the jury to decide whether the gas company was guilty of negligence. The evidence was conflicting.²³⁵ Where the explosion was occasioned by the light of the workman making a connection; and the company insisted that there was not a strong smell of gas, and the workmen were therefore justified in using the light, it was held to be a question for the jury whether or not the workmen had been guilty of negligence.²³⁶ Where the city officers had removed the earth supporting the gas company's pipes, in constructing a sewer, and the gas company requested the court to charge the jury that it was unreasonable to require it to have an inspector present to see if the pipes were properly supported, and having a right in the street, it might rely upon the city to notify it of the condition of the pipes; but the court refused, and charged the jury that it was a question for it to decide whether or not the company had used due care.²³⁷ Where it was alleged that the company had negligently permitted gas to escape from its street mains and enter a house where lights were known to be burning, and the evidence showed that the company's servants requested that the lights be put out; but the plaintiff insisted that the gas

²³⁴ *Chisholm v. Atlanta Gaslight Co.*, 57 Ga. 28.

²³⁵ *Mersey Docks, etc., v. Liverpool, etc., Co.*, 26 Gas J. 327. The verdict was for the plaintiff.

The same method of determining the company's negligence was adopted where the explosion was occasioned by a failure to keep water in

the meter. *Hacker v. London Gaslight Co.*, 32 Gas J. 781.

²³⁶ *Ellis v. London Gaslight Co.*, 32 Gas J. 849.

²³⁷ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Chadwick v. Corporation of Wigan*, 28 Gas J. 562.

found entrance through an open window nearly level with the trench from the main, a hole having been made in the main near the window for a service pipe; it was held that it was a question for the jury, even though it thought the gas thus entered, whether the gas people might reasonably have foreseen it, were bound to have the window closed.²³⁸ Where the service pipe did not fit the main, and there was a subsidence of the soil which carried down the main a year before the accident, which was known to the company's servants; and the gas passed under the ground from the place where the service pipe entered the main, entering the kitchen and exploded, it was held that there was sufficient evidence to go to the jury.²³⁹ Where gas escaped from the pipes laid twelve years before, of which the gas company was duly notified; and it sent servants to examine the place, who said there was no danger; and on a second notification of gas escaping the company sent two men who put in an escape tube; and four days later an explosion occurred, injuring the plaintiff; it was held to be a question for the jury whether or not the company had exercised due care under the circumstances.²⁴⁰ Where it was alleged that the servants of the gas company causing the explosion were drunk when repairing the leak, and that there was a small explosion previously from a break in the pipe, which had been improperly repaired; it was held that the defendant's care was a question for the jury.²⁴¹ Where the plaintiff put in a "bent," close to the joint with the service pipe, and also put in other pipes, all of which was inspected and approved by the gas company, and the evidence showed they had been carefully put in, and there was no decisive evidence to show how the "bent" became cracked, but it was shown that the explosion was caused by a servant of the company carelessly lighting a match in the cellar into which the gas had escaped from the leak in the "bent"; it was held

²³⁸ *Blenkiron v. Great Central Gas, etc., Co.*, 2 F. and F. 437; 9 Gas J. 292, 776; 3 L. T. R. 317. The verdict was for the defendant.

²³⁹ *Fare v. Bath Gaslight and Coke Co.*, 25 Gas J. 566.

²⁴⁰ *Boothman v. Mayor, etc., of Burnley*, 20 Gas J. 585. The verdict was for the plaintiff.

²⁴¹ *Hann v. Weymouth, etc., Co.*, 18 Gas J. 186.

that the leak in the plaintiff's pipe was not as a matter of law evidence of the plaintiff's negligence, but that it was a question for the jury.²⁴² Where the defendant denied that it had negligently permitted gas to escape from its pipe, and insisted that the leak was caused by the negligence of the city officers in not properly packing the earth under a pipe in building a sewer, it was held to be a question for the jury whether or not the company had used due care in seeing that, in restoring the earth to its place, its pipes were properly supported, and if injured, to see that the injury was repaired as soon as it could reasonably be done.²⁴³ Where it appeared that the explosion was occasioned by a theft of a gas pipe and the going into the cellar with a light; and the evidence was conflicting whether notice of the leak had been given to the company, the secretary testifying that the complaint book showed that no notice of a leak had been given; the court charged the jury that it was a question for them whether the accident had been caused by the negligence of the company.²⁴⁴ Where it was claimed that an explosion occurred from the negligence of the meter taker, who had removed a meter and left a pipe open, so that when the plaintiff turned on the gas it flowed from the pipe and ignited, and the company insisted that the employee properly stopped the pipe with white lead, etc., it was held to be a question for the jury whether he had done so.²⁴⁵ Whether applying one's nose to an opening in a floor wherein a gas pipe was plugged, and from which the gas escaped, to ascertain if the gas was escaping is an act that due care requires, there being other well known tests, was held to be a question for the jury. Where the plaintiff lighted a gas radiator, laid down on a couch in the room and went to sleep; and while asleep the gas company, in order to improve the gas pressure, cut off the gas in the building, drew

²⁴² *Lannen v. Albany Gaslight Co.*, 46 Barb. 264; affirmed 44 N. Y. 459.

²⁴³ *Butcher v. Providence Gas Co.*, 12 R. I. 149; 34 Am. Rep. 626; *Medex v. Gaslight and Coke Co.*, 15 Gas J. 75.

²⁴⁴ *Griffiths v. City of London Gas Co.*, 16 Gas J. 139.

²⁴⁵ *Ward v. Gaslight and Coke Co.*, 14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10, 38, 74, 108.

off the water accumulated in the pipes, and turned on the gas again, its usual practice being to warn the tenants of buildings of its intention to obstruct the flow of gas, but the evidence was conflicting as to what steps the company's servants endeavored to warn the plaintiff, there being testimony that they knocked on the door, but not sufficiently loud to arouse the plaintiff; it was held that it was a question for the jury whether the company's employees used such care as was incumbent on them under the circumstances, but there was no question of contributory negligence.²⁴⁶ Where gas escaped into a cellar from a pipe eleven feet away resting in soft and shaly soil; and there was an abandoned coal mine under the entire neighborhood; and after the explosion the coal was found to be burning; and one witness testified that the pipe had broken on account of a sewer excavation, and another that the pipe was rotten; and there was evidence of an earlier trouble at the same point; it was held that it was a question for the jury, under the gas company's claim that the leakage was caused by the mine's caving in on account of the fire, whether it had been guilty of negligence, and that it was error to direct a verdict in its favor.²⁴⁷ Where a company's piping was not connected with the piping in a building until the owner or tenant made an application for gas and furnished plans of the piping in the building, whereupon the company delivered a meter, letting the applicant make connection with its pipes, without itself making an examination; and the tenant of a store room, having received a meter, engaged a plumber to put it in and make the connection; and a pipe running into an apartment above the store was uncapped, from which gas escaped, killing the tenant's child; it was held to be a question for the jury whether the gas company had used reasonable precautions.²⁴⁸ Where the gas escaped through a break in the street pipe into the plaintiff's sleeping room, to his injury; and the evidence

²⁴⁶ *Beyer v. Consolidated Gas Co.*, 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628.

²⁴⁷ *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

²⁴⁸ *Schmeer v. Gaslight Co. of Syracuse*, 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; reversing 65 Hun 378; 26 N. Y. Supp. 1128; 20 N. Y. Supp. 168.

showed that the break was probably caused by the settling of the earth after the construction of a nearby sewer; and that the gas had been escaping a whole day when discovered by a policeman; it was held that there was evidence enough to justify the submission of the case to the jury.²⁴⁹ Where the bills of the gas company had a notice on them that information of all leaks should be sent to the office of the company; that a complaint of a leak was made to an employee of the company, and he promised to have it repaired; that afterwards a man sent to examine the leak found it in a chandelier, and worked about twenty minutes in repairing it; that the gas escaped during the night, to plaintiff's injury, from the chandelier, in which the next day was found a leak, which an expert testified could not be properly stopped without taking down the chandelier and taking off the casing; it was held that there was evidence for the jury from which to determine whether the gas company had undertaken to find and stop the leak, in which event it would be liable.²⁵⁰ Where the gas company had no system of inspection, but waited for complaints before making inspections; and some of its pipes had been laid in cinder for twenty years, which had a tendency to corrode them; the question of negligence was considered one for the jury.²⁵¹ The coincidence of the decay and death of vegetation with the leakage of a large amount of gas after the laying of a new main and until its recalking; and the fact of the healthy growth of vegetation after the recalking, will sustain a conclusion of the jury that the escape of the gas was the cause of the injury.²⁵² A gas company's street main ran within a few feet of the cellar of a factory. An explosion occurred in the factory, injuring the plaintiff. Several months previous to that time a sewer connection for the factory had been made, which ran under the

²⁴⁹ *Greaney v. Holyoke, etc., Co.*, 174 Mass. 437; 54 N. E. Rep. 880. *Co.*, 2 Pa. Super. Ct. 179; 39 W. N. C. 28.

²⁵⁰ *Ferguson v. Boston Gaslight Co.*, 170 Mass. 182; 49 N. E. Rep. 115. ²⁵² *Evans v. Keystone Gas Co.*, 148 N. Y. 112; 42 N. E. Rep. 513; 28 Chic. Leg. News. 160; 30 L. R. A. 651; 51 Am. St. Rep. 681; affirming 21 N. Y. Supp. 161.

²⁵¹ *Prichard v. Consolidated Gas*

gas main. The testimony of the plaintiff tended to show escaping gas had been detected at the place where the gas main crossed the sewer connection for several weeks prior to the explosion, which occurred on the opening of a trap door into the cellar; that soon after an old and rusty break in the pipe immediately in front of the factory was discovered, and that the company had been notified of the presence of gas in the neighborhood more than two weeks before the explosion, but did nothing in response to it. The gas company denied receiving notice, and gave testimony in general rebutting the plaintiff's testimony. The plaintiff claimed that the gas escaped from a break in the gas main, passed through the sand until it reached the sewer pipe, followed this into the cellar, and there collected. It was held that the case was one for the jury.²⁵³ For two weeks prior to an explosion of gas in a sewer manhole escaping gas had been detected; and it was the duty of the employees of the gas company lighting street lamps to report leaks they had detected. A leak in a main one hundred feet from the explosion was found in this main immediately after the explosion occurred, was repaired, and the gas ceased to flow. About two weeks before the explosion the company had been notified of escaping gas; and upon examination no escape of gas had been found. It was possible for the escaping gas from the leak to find its way through the earth, enter sewers, and accumulate in covered sewer holes. There was no probability of gas escaping from any other gas main than that of the defendant company. It was held that there was evidence enough to support a verdict for the plaintiff, in an action to recover damages occasioned by the explosion.²⁵⁴ Where the action was to recover for the death of a horse, occasioned by it inhaling gas, an instruction to the jury that if the plaintiff "had reason to believe that the gas was escaping, and knew the danger of escaping gas, and left the

²⁵³ *Henderson v. Allegheny Heating Co.*, 179 Pa. St. 513; 39 W. N. C. 485; 36 Atl. Rep. 312.

²⁵⁴ *Tiehr v. Consolidated Gas Co.*, 51 N. Y. App. Div. 446; 65 N. Y. Supp. 10.

The court charged the jury that the evidence should exclude all other theories than the plaintiff's, tracing the origin of the exploding gas to the break in the defendant's pipe.

horse there without providing for the danger, thinking the escape of gas was not sufficient to do any damage, he cannot recover," was held to have been properly refused; for as a matter of law negligence was not an inevitable and necessary inference from the facts stated, but was a question for the jury.²⁵⁵ Where the defect in a gas pipe was occasioned by the construction of a sewer, it was held to be a question for the jury whether or not the gas company having a proper system of inspection ought to have known of the leak sooner than it was in fact discovered.²⁵⁶ If there be no evidence to show negligence on the part of the gas company, then the court must direct the jury to find against the plaintiff; and it is error to submit the question of negligence to the jury.²⁵⁷ Where the explosion occurred in the cellar, the exploding gas having escaped from a break at the junction of the service pipe with the "riser"; and the company's workmen were engaged in repairing the mains opposite the house in which the explosion occurred, but there was no evidence to connect them in any way with the explosion, or to show that their work in any way affected the service pipe, the complaint was dismissed.²⁵⁸

²⁵⁵ Lee v. Troy, etc., Co., 98 N. Y. 115.

If it is shown that a pipe was broken and gas escaped from it whereby one is injured, the jury may infer negligence on the part of the gas company from the facts thus shown. Carmody v. Boston Gaslight Co., 162 Mass. 539; 39 N. E. Rep. 184.

²⁵⁶ Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653; Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 633; Ki-

bele v. Philadelphia, 105 Pa. St. 41 (on the duty of a patrolman to notify the city of a leak where the city is furnishing gas to consumers).

²⁵⁷ Allegheny Heating Co., v. Rohan, 118 Pa. St. 223; 11 Atl. Rep. 789.

It was held that the evidence of an explosion was insufficient to submit to the jury, Hutchinson v. Boston Gaslight Co., 122 Mass. 219.

²⁵⁸ Krzywoszynski v. Consolidated Gas Co., 4 N. Y. App. Div. 161; 39 N. Y. Supp. 929.

CHAPTER XXX.

INJURIES CAUSED BY OIL AND GAS—NEGLIGENCE.

- §664. Scope of chapter.
 - §665. Fire on railroad communicating with refinery.
 - §666. Neglect in not providing stop-cock.— Injury to servant.
 - §667. Injuries from shooting wells.
 - §668. Oil escaping into sewers.
 - §669. Injury occasioned by exploding gasoline fire-pot.
 - §670. Use of false brands.— Explosion.
 - §671. Negligent care of grounds.— Fire communicating to adjoining houses.
 - §672. Oil escaping from an exploding refinery.
 - §673. Rescuer injured by negligence of an oil or gas company.
 - §674. Minor's employe's oil-soaked clothes catching fire.
 - §675. Explosion of benzine used in paint.
 - §676. Servant of oil company injured by defective appliances.
 - §677. Injuries to servant of purchaser.— Sale in violation of statute.
 - §678. Sale of oil of low fire test, explosion.— Deception.
 - §679. Implied warranty in sale of illuminating oil.
 - §680. Gas box in sidewalk.
 - §681. Negligence of contractor.
 - §682. Streets rendered dangerous by laying gas mains.
 - §683. Imperfectly constructed gas building.
 - §684. Exploding tank injuring servant.
 - §685. Servant entitled to safe place in which to work.
 - §686. Servant injured by use of defective ladder.
- §664. Scope of chapter.

It is not the intention to repeat in this chapter what has been discussed in other chapters and under heads more appropriate. Nor can there be any systematic arrangement of the contents of this chapter — the aim being to gather up such decisions as pertain to injuries that have been caused by oil or gas, or by negligent conduct in the operation of gas works or pipe lines, or in the operation of oil leases. Under the head of Leaks and

Explosions will be found a discussion of negligence in connection therewith.

§665. Fire on railroad communicating with refinery.

A railway company left standing on its switch a car used in carrying tar. A passing locomotive set fire to it, and the fire communicated to an oil tank thirty-six feet away, which was a part of the plaintiff's oil refinery. The fire then communicated with the refinery and it was destroyed. The company was held liable, and in passing on the case the court used the following language: "While this is perhaps a close case upon its face, we are of the opinion that the judgment must be affirmed. It could not have been withdrawn from the jury, nor are we able to see any error in the manner of its submission. The learned judge could not have ruled, as a question of law, that the plaintiff was guilty of contributory negligence in erecting his oil tank where he did. The sparks from the locomotive were not likely to set fire to oil in the tank, nor did they do so in this case. The accident would not probably have occurred, had not the defendant company permitted a car, used for carrying tar, to stand on the track opposite to, and near, plaintiff's oil tank. This car caught fire from the sparks of the engine, and was wholly or partly consumed. It was the fire from this car which ignited the oil and caused the destruction of plaintiff's works. The accident could have been avoided by running the car a short distance away after it had taken fire. This was eminently a jury case."¹

§666. Neglect in not providing stop-cock.—Injury to servant.

An oil company must provide the usual means to prevent injuries in case of an accident, so that the flow of the oil may be controlled, especially where it is used in connection with fires. We take the following statement from an Illinois case, where a

¹ *Confers v. New York, etc., R. R. Co.*, 146 Pa. St. 31; 23 Atl. Rep. 202.

company using large quantities of oil was held liable: "This was an action on the case by appellee against appellant, to recover for personal injury alleged to have been received through the negligence of appellant. For several years before the accident, appellant had been engaged in burning brick, and appellee worked as its servant in that business. In 1887, appellant commenced burning brick with crude oil for fuel, and appellee, before his injury, had assisted in burning several kilns of brick by the new method. In May, 1888, shortly after the kiln was fired, the injury occurred. The kiln being burned was 70 or 80 feet long and about 30 feet wide; there were 18 or 20 arches running through from side to side. Around the kiln, a little way from it, near the ground, two pipes were laid side by side, each about two inches in diameter. One of these pipes carried steam, and the other oil for fuel. Opposite the end of each arch, two short pipes, three-fourths of an inch in diameter, extended towards the arch, one connected with the oil pipe, and the other the steam pipe. The short pipe was about two feet and a half long; the small oil pipe perhaps a foot long. On the end of the steam pipe, at each arch, was placed what was known as the "burner." In the small oil pipes there was a check valve or stop-cock, near the main oil pipe, and the connection was made between this pipe and the burner by a rubber tube connecting the short pipe with the burner. The purpose for which the rubber was used was to permit expansion and contraction of the small steam pipe; in other words, so as to make the pipe containing the oil flexible. The burner was by this means extended, not into, but as near, the arch as possible, and the oil injected into the arch by the action of the steam through the burner. On a side track, 20 feet or more away from the kiln, common railroad oil tanks were run on their trucks, and the oil carried therefrom by means of a two-inch pipe, and emptied into the oil pipe surrounding the kiln. Prior to the time of the accident, but one tank had been used at a time, and the supply pipe from the tank was fitted with a check valve near its entrance into the feed pipe, or the pipe encircling the kiln. Each of the small pipes extending from the steam and feed pipes were sup-

plied with a stop-cock near the feed pipe, so that both steam and oil could be shut off from any individual burner. There was also a check valve on the tank, by closing which the flow of oil from the tank could be shut off. This valve was so arranged that it could not be turned by hand, but necessarily required the use of a wrench or tongs. In the afternoon before the accident, the kiln being in condition to fire, Williams, the kiln foreman, was ordered by appellant, through its superintendent, to cut the feed pipe in the middle of the kiln on each side and stop the ends, which was done. Prior to this, there had been in use what was known as the Brown burner. They were directed to attach the Brown burner to one-half of the feed pipe, or the pipe encircling one-half of the kiln, which appellee and the gang of men with him, under the direction of the steamfitter of appellant, did. By the cutting of the oil pipe, the circulation of oil around the kiln was impossible, and, to supply the other end, another tank was run upon the side track, and attached, by a new supply pipe, with the other half of the feed pipe, so as to furnish oil to run the other burners to be thereto attached. The purpose was to test the relative merits of the Brown burner, and another called the Cannon burner, to see which would consume the greater amount of oil in producing the requisite continued heat. The attachment between the additional tank and the pipe surrounding the half of the kiln at which the Cannon burners were to be tested, including putting on the burners, was made by 'Mr. Cannon and his men,' possibly assisted by Mr. Williams, kiln foreman, and perhaps other fellow workmen about the kiln. Cannon had been a gasfitter, was familiar with the work, but neither he nor the men under him were in the employ of appellant. In making connection between the tank and the feed pipe encircling the half of the kiln at which the Cannon burners were put, no stop-cock or valve was put in where the supply pipe from the tank joined the feed pipe, so that the oil running to the Cannon burners could be shut off only at two points — at the tank, and at the small stop-cocks where the small burner pipes joined the feed pipe. At the other end, the supply pipe formerly in use was put in, which was supplied with the

check valve near the feed pipe. This arrangement of the pipe to which the Cannon burners were attached was made by Cannon, and, as before said, possibly with the knowledge of the foreman; but appellee, not the gang of men with whom he worked, had no notice that the stop-cock at the joining of the supply and feed pipes had been omitted. The rubber pipe leading to the burner, from the heat and action of the oil, was soon destroyed, and would break or crack off, permitting the oil to escape, and the oil, being highly inflammable, would catch fire from the heat of the arch, and prevent the close of the small check valve in the pipe leading to the burner; and in such case the stop-cock at the junction of the supply and feed pipes had always been used, and, by shutting off the oil there, a conflagration was prevented. This condition of things was known to appellant, and it had supplied rubber tubing in considerable quantities to take the place of such as might be destroyed in that way. It is shown that the breaking of the rubber and escape of the oil was frequent, the rubber lasting sometimes during the burning of a kiln and sometimes not. The kiln was fired in the evening. Appellee and the gang of men under him were in charge of the end of the kiln to which the oil or Brown burners were fixed, and Williams and another shift of men in charge of the other end, until about 12 o'clock midnight, when Williams and his gang retired, and appellee and two helpers took charge of the entire kiln. About 4 o'clock in the morning appellee was on a ladder at the side of the kiln, observing the top, when a rubber hose, connecting with one of the Cannon burners burst, and the oil immediately took fire, and, extending, so covered the small stop-cock that it was impossible to close it. He ran immediately to the place where the supply pipe joined the feed pipe, expecting to find the stop-cock, where it had always previously been found, but found none. He called to the other employees, and went himself about 200 feet, and turned in the fire alarm, and immediately returned to the end of the kiln where the fire was spreading. The fire was spreading rapidly, was very hot, and, fearing an explosion of the oil in the tank, appellee determined to disconnect the tank from the sup-

ply pipe, and get it away from the fire. For this purpose he directed one of the men to shut off the tank; that is, to close the valve between the tank and the supply pipe. One of the men went on to the tank for that purpose, and again got off. Appellee inquired if the valve had been closed, and one of the men replied that it had. He again inquired, and, upon being assured that it had been closed, he went under the tank, disconnected the feed pipe from the tank, when the oil from the tank flowed over him, and saturated his clothing, which instantly caught fire from the burning oil spreading from the feed pipe. Appellee was seriously injured. It appears that the man who went upon the tank to close the valve endeavored to do so with his hands. Finding that impossible, he ran to get a wrench; but upon his return the flames were sweeping over the tank, and drove him away. The negligence charged in the declaration, in the first count, was the neglect of appellant to furnish proper and safe connections between the tank and the brick kiln, and that appellant negligently and improperly provided and used a connection made of rubber, which was unsuitable and improper for such purposes; that the rubber became heated and cracked and broke, permitted the oil to escape, which took fire, etc. The second count alleged the use of crude oil was dangerous and hazardous; that plaintiff was in appellant's employ as assistant to the foreman, and his employment necessarily brought him near to the tanks, kilns, etc., and it became and was the duty of appellant to exercise a high degree of care and diligence in providing proper and safe appliances around the brick kiln and oil tank, and proper connections, etc., and also to provide a safety check, or some suitable device, to stop the flow of oil in case of accident, etc., so as to insure the safety of its employees; yet appellant did not do so, but carelessly, negligently, and improperly provided a connection made of rubber, which, on becoming heated, vulcanized and broke, and the oil thereby escaped, and, not having provided suitable and proper appliances by which the flow of the oil could be checked, the

flames from the kiln communicated with the oil, resulting, etc.”²

§667. Injuries from shooting wells.

Under proper circumstances and at proper times it is not unlawful to shoot a well so as to increase the flow of gas or oil; but to shoot a well in a densely settled community, as in a city, is so dangerous an undertaking that a court of equity will enjoin it.³ A well may be shot so carelessly or at so improper a time as to render those shooting it liable for damages incurred by the act of shooting it. Thus where a company engaged in the business of shooting wells with powerful explosives, was employed to shoot a well in a village, and its practice was to carefully lower the explosive to the bottom of the well, and then explode it by dropping into the well a weight called a “go-devil”; and the shooting company claimed that its agent instructed the owner of the well not to drop the “go-devil” until morning arrived, and that he disobeyed the instruction and let it drop at 7:30 in the evening; and it appeared because of the season (it was September) fires and lights were burning when the well was shot; and it was well known that when a well was shot large quantities of gas would escape from the well and settle close to the earth under certain conditions of the atmosphere, and explode if it came in contact with fire; and it was shown that an engine near the well had a fire in it; and when the well was shot gas escaped, exploded and injured a boy permanently, the shooting company was held liable, and could not shift the liability upon the owner of the well; for it was hired to shoot the well, and the owner in dropping the “go-devil” was simply acting for and in their place and stead.⁴ In this case it was held proper to ask a witness, who knew the prevailing custom of well shooters, if 100 quarts of nitroglycerine were lowered into a

² Pullman Palace Car Co. v. R. A. 443; Hill v. Schneider, 43 N. Laack, 143 Ill. 242; 32 N. E. Rep. Y. Supp. 1; 13 N. Y. App. Div. 285; 18 L. R. A. 215. 299; 4 N. Y. Ann. Cas. 70.

³ People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. ⁴ Ohio, etc., Co. v. Fishburn. 61 Ohio St. 608; 56 N. E. Rep. 457.

well, the well "logged" on, the derrick boarded up except an opening facing the engine and belt house, the well situated 80 to 200 feet from residences surrounding it, the village containing 1,200 inhabitants, and the condition of the atmosphere was such that when the gas was liberated it would settle near the earth — if it would be a proper time to shoot the well at 7:30 in the evening of September 7, when darkness had intervened and fires and lights were lit in residences and business houses. It was said that the fact called for was not an ultimate fact in issue, was not a subject of common knowledge, nor one that the jury could as well judge as the witness. As the expert knew all the dangers incident to the explosion, at the place and hour and in the surroundings, it was considered that his opinion would aid the jury in drawing a conclusion, better than they could draw from the facts proven.

§668. Oil escaping into sewers.

It is the duty of an oil company to keep its oil on its own premises, and if it permit it to escape, and thereby another is injured, it will be liable. The liability does not seem to rise out of any negligent act; but out of a duty of the company to keep on its own premises an agency that may work an injury to another, or at least in all likelihood will do so. Thus where petroleum escaped from an oil tank, percolated through the soil to a sewer in which gases formed from the oil, and found their way into a bakery and so contaminated the air as to injure the products manufactured by the baker, it was held that the company permitting the oil to escape was liable. The fact of the sewer conveying the gases to the bakery, and that they would not have reached the bakery but for it, was considered not to make the negligence of the owner of the oil remote, for the reason that the sewer was a condition rather than a cause, not an independent cause of the injury making it the proximate cause.⁵ If,

⁵ *Brady v. Detroit, etc., Co.*, 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175.

however, the escape of the oil is unavoidable, then the oil company will not be liable for its escape and the injury it inflicts. Thus where oil was properly stored, but a fire broke out on the premises without the neglect of the company, and the oil escaped to adjoining premises, from which it was drained by a ditch dug pursuant to the orders of the fire chief of the city into a sewer, no person or officer of the oil company giving any direction concerning the digging of the ditch or as to the turning of the oil into it; and the petroleum generated gases in the sewer, which exploded, resulting in a death, it was held that the oil company was not, but the city was, liable.⁶

§669. Injury occasioned by exploding gasoline fire-pot.

A tinner was employed to put on a part of a building a tin roof, while upon the remaining part a shingle roof was being put on, by another contractor. In doing so he used a gasoline fire-pot to heat his soldering iron. The wind was blowing, and to prevent it blowing the fire the tinner's servant set up some shingles on both sides of the fire-pot; but they catching afire, he set up some tin. The tin so reflected the heat of the fire as to raise the temperature of the gasoline in the tank of the fire-pot that it exploded, and injured a servant of the person putting on the shingle roof. The tinner's servant knew that gasoline would explode when heated sufficiently. It was held that the tinner was liable to the servant of the contractor putting on the shingle roof.⁷

⁶ *Fuchs v. St. Louis*, 133 Mo. 168; 31 S. W. Rep. 115; 34 S. W. Rep. 508; 34 L. R. A. 118.

The owner of dangerous oil must keep it under control. *Langabough v. Anderson*, 22 Ohio Cir. Ct. Rep. 178; 12 Ohio C. D. 341.

⁷ *Evans v. Hoggatt*, 9 Kan. App. 540; 59 Pac. Rep. 381.

When a cylinder charged with carbon dioxide very unexpectedly exploded; and such explosion was very unusual, the owner was held

not liable, although he had made no test of the cylinders except that when they were filled they were subject to a test much greater than continued afterwards, there being no general usage or custom as to testing them. *Kilbridge v. Carbon, etc., Co.*, 201 Pa. 552; 51 Atl. Rep. 347.

A dealer in building materials is not liable for damages occasioned by a fire originating from some unknown cause in the basement of his

§670. Use of false brands.—Explosion.

If oil be falsely branded, to render the oil company liable for damages occasioned by it exploding, the deception must in some way have led to or be connected with the injury. Thus where 74 degrees gasoline was marked "puroline," and both oils were manufactured from petroleum, and both as the evidence showed, were equally dangerous, the deception was held not to be such as to render the oil company liable for an explosion, which would have occurred even if that grade of gasoline had actually been furnished.⁸

§671. Negligent care of grounds.—Fire communicating to adjoining houses.

An oil company must keep its premises in such a condition that it will not be liable to lightly or easily catch fire, and thereby endanger properties near it. Thus where an oil company permitted its buildings and grounds to become soaked with oil, and also allowed a large number of "jackets" used on oil cans and barrels to accumulate on the premises, so that a passing locomotive easily set them on fire, and the fire reached adjoining buildings and destroyed them, the oil company was held liable, for the reason that if it had kept its premises and buildings in a proper condition the fire would not have been started, and if started could have been controlled. In this case the plaintiff's buildings that were burned had been built after he knew of the condition of the oil company's premises and buildings; but this was held to make no difference.⁹ Nor would it have made any difference if the plaintiff had previously sold the grounds to the company to use in their oil business.¹⁰ In such

store where he kept oils, paints, varnishes and cotton. *Cook v. Anderson*, 85 Ala. 99; 4 So. Rep. 713.

⁸ *Socala v. Chess Carley Co.*, 39 La. Ann. 344; 1 So. Rep. 824. In this case the servants of the plaintiff were guilty of negligence in drawing the oil at night and using

a lighted lantern to aid them in seeing how to work.

⁹ *Waters-Pierce Oil Co. v. King*, 6 Tex. Civ. App. 93; 24 S. W. Rep. 700.

¹⁰ *Judson v. Giant Powder Co.*, 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718.

an instance, the general practice and custom of oil companies is admissible to rebut the charge of negligence, but evidence of the practice and custom of a particular company is not.¹¹

§672. Oil escaping from an exploding refinery.

Where oil escaped from a refinery because of an explosion, and flowed down a pipe line to a lighter in a harbor, used for the conveyance of oil, set it on fire, causing it also to explode, and by reason of it exploding a vessel moored in the harbor was set on fire, the refining company was held not liable for the loss of the vessel; for the reason that it was not shown that the refinery company was negligent in the operation of its works nor the explosion caused by negligence. The mere fact of the explosion was held not to show negligence, for the reason "That there is a general disposition among men to preserve their property and escape liability, and ordinarily their motives will secure that degree of care and caution which the safety of the public demands; hence the presumption of duty performed which in cases of fire will protect him until the facts be proven from which negligence can be inferred."¹² But this rule has not always been accepted, some of the courts holding that the fact of an explosion raises a presumption of negligence.¹³ Where oil escaped from a refinery and reached water in a harbor; and it was set on fire by a person throwing a lighted match into the water, and the fire burned a boat, the refinery company was held not liable, the escape not being the proximate cause of the loss.¹⁴

¹¹ *Standard Oil Co. v. Swan*, 89 Tenn. 434; 14 S. W. Rep. 928; 15 S. W. Rep. 1068; 10 L. R. A. 366.

Employee in restaurant throwing out flaming gasoline lamp that exploded, burning the plaintiff. See *Donahue v. Kelly*, 181 Pa. St. 93; 37 Ati. Rep. 186; 59 Am. St. Rep. 632.

¹² *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 25 N. E. Rep. 259.

¹³ *Warn v. Davis Oil Co.*, 61 Fed. Rep. 631; *Judson v. Giant Powder Co.*, 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718.

¹⁴ *Neal v. Atlantic Refining Co.*, 4 Pa. Dist. Rep. 49.

§673. Rescuer injured by negligence of an oil or gas company.

To render an oil or gas company liable to one who has been injured in attempting to rescue one imperilled by a fire or an explosion, the company must have been guilty of negligence in some way that imperilled the person whom the injured person attempted to rescue. In such an instance the oil company must have been guilty of negligence toward the person who was in danger, or to the rescuer, in order to hold it liable.¹⁵ But where a city dug a trench in the street, in which gases accumulated to such an extent that the workmen abandoned it, leaving it open several days; and there was such an arrangement of timbers leading down into it as amounted practically to a ladder, down which a boy descended to secure his ball that had fallen into the ditch, the place where he descended being near a school playground in a populous part of the city, when he was overcome with the gas; and his playmate, seeing him fall back into the ditch as he was coming out, went to his rescue, not knowing of the gas, and lost his life in endeavoring to save his comrade, it was held that the city was liable for the death of the latter, being bound for the consequences of its neglect, though such consequences were not and could not by any ordinary prudence have been anticipated. The acts of the boy who went to the rescue of his playmate, it was held, must be considered in view of the circumstances that he had no time to think, but must act at once, and that others had gone into the ditch before and returned safely, and also that his playmate whom he went to rescue returned after recovering from the effects of the gas, and above all that he went to the rescue of a human being in great and imminent danger. Consequently he was not chargeable with errors of judgment resulting from the excitement of the moment.¹⁶

¹⁵ *Jackson v. Standard Oil Co.*, 98 Ga. 749; 26 S. E. Rep. 60; *Donahue v. Wabash, etc., Co.*, 83 Mo. 60; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316; 28 N. E. Rep. 172; 13 L. R. A. 190.

¹⁶ *Corbin v. Philadelphia*, 195 Pa. St. 461; 45 Atl. Rep. 1070; 49 L.

R. A. 715. For analogous cases, see *Maryland Steel Co. v. Moorney*, 88 Md. 482; 42 Atl. Rep. 60; 42 L. R. A. 842; *Peyton v. Texas & Pacific Ry.*, 41 La. Ann. 861; 6 So. Rep. 690; *Gibney v. State*, 137 N. Y. 1; 33 N. E. Rep. 142; 19 L. R. A. 365.

§674. Minor employee's oil-soaked clothes catching fire.

A boy was working for an oil company, and his clothing became soaked with oil. It was a cold day, and becoming chilled he was directed by the superintendent in charge of the place to go to an upper room of the building the company was using and warm himself at the stove in the room. He was not warned that his clothing was liable to take fire if he got close to the stove. He went up into the room and approached close to the stove, which was quite hot, when his clothing took fire. He tried to escape from the room, but the door having become fastened by reason of the lock being defective, he jumped out of an upper window and received injuries from which he died. The oil company was held liable, because it was the superintendent's duty to warn the boy of the danger of getting close to the stove when his clothes were in their oil soaked condition.¹⁷

§675. Explosion of benzine used in paint.

A master painter sent his servant to paint the inside of a water tank, which was ten feet in diameter and twelve feet deep. He furnished the servant paint that had been in common use twelve years; and the master did not know the paint was dangerous. It was supposed that the paint contained a certain amount of benzine; and when the cans were opened and the paint applied to the sides of the tank it threw off some gas which, coming in contact with a light necessarily used, caused an explosion and injured the servant. The master was held not liable, on the ground that he had provided such material and implements as were ordinarily used by persons in the same business, and he was required to do nothing more. He was not required to secure the best known material, or subject the material he used to a chemical analysis in order to discover a possible or remote hazard incurred by their use.¹⁸

¹⁷ Wallace v. Standard Oil Co., McCormick, 118 Pa. St. 519; 12 66 Fed. Rep. 260. Atl. Rep. 273.

¹⁸ Allison Manufacturing Co. v.

§876. Servant of oil company injured by defective appliances.

Where a servant of an oil company was injured by a defective still in the refinery, the refining company was held liable. In this case the still was built by an independent contractor according to the plans of the president of the company, and by him placed in the refinery of the company. "If I employ a well known and reputable machinist," said the court, "to construct a steam engine and it blows up from bad materials or unskilled work, I am not responsible for any injury which may result, whether to my servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of construction. The machinist then becomes my servant, and respondent superior is the rule."¹⁹ A servant descended with a light into an oil still to repair it, and gas exploding, he was killed. His employer was a distiller of crude petroleum, and used the tank for that purpose. In the distilling of the oil large quantities of gas were generated, which escaped into a running room when the stills were in operation; but when the stills were empty, some of the gas which escaped from the pipes into the running room found its way back into the stills, because no stop-cocks had been put in the pipes to shut it off. It was necessary for the employe to have the light when he went into the still to repair it. The oil refining company was held liable on the ground that it had not furnished safe appliances and a safe place in which to work.²⁰ A refinery employed a servant to manufacture varnish, in which naphtha was used, by a process known only to himself. He was injured by an explosion. He claimed that the company was liable because the appliances and structure for the manufacture of the varnish were defective, that the place where he worked was unsafe, because near a furnace, to the fire of which the fumes or gas of the naphtha

¹⁹ Ardesco Oil Co. v. Gilson, 63 Pa. St. 146.

²⁰ Nicholas v. Brush, 53 Hun 137; 6 N. Y. Supp. 601. In this case it was held that the defective condi-

tion of the appliances could be shown by a conversation which another and former employe had with the superintendent of the refinery.

could reach, as it did when he was injured, of which defects the company had notice. It appeared that the servant had designed the appliances, and there were doors which could be closed so the gases from the naphtha could not reach the furnace fire, which was in an adjoining room. The servant had full charge of the work, was skilled in his art; while the defendant had been owner of the plant only a week. The servant had been in the service of the former owner of the plant many months. The defendant was held not liable.²¹ So where a servant, who had been at the same work over a year, went into a still with a light, knowing the danger of an explosion of the gas by reason of its coming in contact with the lighted candle he was carrying, and was injured by an explosion, it was held that the employer was not liable.²²

§677. Injuries to servant of purchaser.—Sale in violation of statute.

It is the duty of a vendor of a dangerous article to give notice of its dangerous qualities to the person to whom he sells it; and if he do not, and an injury to such person is occasioned by it, which is the natural and probable consequence of the vendor's neglect, such vendor is liable. And if the sale has been made by an agent of the vendor, and such agent is ignorant of the dangerous character of the article, and sells it to a purchaser without warning, the vendor will still be liable. The purchaser's servant has the same right to recover, in case he is injured, as the purchaser possesses. Thus where the agent of a company sold 110 gallons of naphtha of the grade of 87 degrees, the most dangerous naphtha manufactured and sold, to a laundryman, and assisted him in storing it in a shed on the rear of the laundry premises, about thirty feet from where the furnace of the laundry was situated; and twice a day they drew ten gallons and took it into the laundry to heat the ironing ma-

²¹ *Hauk v. Standard Oil Co.*, 38 N. Y. App. Div. 621; 56 N. Y. Supp. 273.

²² *Benfield v. Vacuum Oil Co.*, 75 Hun 209; 27 N. Y. Supp. 16.

chinery; and it was the duty of a boy and a foreman to remove the gasoline from the place of storage for use; and when they were doing this on a July day gas escaped from the storage tank, penetrated the atmosphere, entered the open door and window of the laundry building, came in contact with the furnace fire, exploded, and so injured the boy that he died, the oil company was held liable. No one knew of the dangerous qualities of the gasoline except the company, even its agent being ignorant of them, who innocently represented that there was no danger in storing the gasoline where it was put, upon which statements the purchaser relied. The court considered that the local agent had a right to make the representations he made, they coming within his apparent authority, and they were binding upon it, although authority to make them was not given him. The court refused to allow the oil company to show by a general agent that it was not the custom to make any representations concerning storage and the use of gasoline, in view of the fact that representations were actually made and the purchaser was not aware of the custom; and also in view of the fact that the law required a vendor of a dangerous article to notify the vendee of its dangerous qualities. The court also held that the proximate cause of the injury was the failure to give the purchaser notice of the dangerous qualities of 87 degree gasoline and the employment of an agent ignorant of such qualities. The court did not consider that the negligence of the company was remote by reason of the fact that the heat from the laundry may have generated the gas, because the oil was stored where the local agent of the company directed it to be placed, and also because the laundryman was induced to purchase it by reason of the representations of the local agent that it was safe, that he knew the use to which it was to be put, and the oil company must have known how it was to be used, for they shipped it directly to the purchaser.²³ Where a statute provided that "no gasoline shall be sold, given away or delivered to any person

²³ *Waters-Pierce Oil Co. v. Davis*,

24 *Tex. Civ. App.* 508; 60 *S. W.*

Rep. 453.

in this State until the package, cask, barrel or vessel containing the same has been marked gasoline"; and a dealer sold gasoline in jug without marking it; and the minor child of the purchaser was injured by it, it was held that the vendor was liable. The court considered that the statute was for the protection of all persons in the State, the label or mark being required to warn them of the substance they were handling, so that the failure of the vendor to properly mark the package or cask was negligence *per se*. In this instance the girl, having no knowledge that the oil was gasoline, put a small quantity of it in the stove to light the fire, and on lighting it, it exploded, setting fire to her clothes. The father and the purchaser knew the jug contained gasoline, but did not tell her of it. His negligence was held not to be imputable to her.²⁴

§678. Sale of oil of low fire test, explosion.— Deception.

A sale of oil of low fire test for illuminating purposes may render both the salesman and the manufacturer liable, in case of an explosion producing an injury; and so far as the manufacturer is concerned, it matters not how many dealers' hands through which it passes. "A manufacturer of oil," said the court in one case, who sells it as bearing a high and safe fire test, "when in fact he knows that its fire test will not exceed 64 to 65 degrees Fahrenheit, and that this is a most explosive and unsafe oil for domestic use, can plead nothing in a defense of this willful, terrible wrong to a confiding community. He bears with him a heart regardless of social duty, evidencing malice in a legal sense in a high degree."²⁵ So where a manufacturer knowingly sold to a retail dealer naphtha oil for illuminating oil, and the retail dealer sold some of it to a consumer, and an explosion occurred when the consumer attempted to use it in a lamp, the manufacturer was held liable, the consumer not knowing the kind of oil it actually was.²⁶ Ignorance of the law re-

²⁴ *Ives v. Wilden*, 114 Iowa, 476; 87 N. W. Rep. 408; 54 L. R. A. 854.

²⁵ *Elkins v. McKean* 79 Pa. St. 493.

²⁶ *Wellington v. Downer Kerosene Co.*, 104 Mass. 64.

quiring a test or whether the oil is below the test will not excuse the vendor.²⁷ The illegal intent will be presumed; and anything in rebuttal thereof is a proper matter for the defense.²⁸

§879. Implied warranty in sale of illuminating oil.

In the sale of illuminating oil there is an implied warranty that it is fit for the purpose sold, and that it is not below the test required by law, where a statute requires a test to be made and fixes the standard. In a case of a sale of oil that was not up to the test required, and it exploded, causing the death of a person, it was held that not only the immediate salesman was liable, but also the refiner who put it on the market.²⁹ Where an oil dealer sold a grocer naphtha for kerosene, and the latter sold it to a consumer, who knowing not the contrary, in using it was injured by it exploding, it was held that the dealer was liable to the person injured.³⁰ A specification in a contract by the manufacturer of refined petroleum for its sale, to the effect that it shall be of a certain brand, color, and fire test, does not exclude an implied warranty that it shall be free from latent defects arising from the process of manufacture which would render it unmerchantable.³¹ A provision in such a contract that the acceptance of the petroleum by the buyers' inspectors shall be an acknowledgment that the goods are in accordance with the contract; and a certificate by the inspector to that effect, do not relieve the manufacturer from liability on an implied warranty that the petroleum is free from latent defects arising from the process of manufacture, which renders it unmerchantable.³² Evidence that the defendant knew from the manner in

²⁷ *Downing v. State*, 66 Ga. 160; *Horrigan v. Nowell*, 110 Mass. 470.

²⁸ *Ibid.* A statute prohibiting the sale of naphtha does not prohibit the generation of gas from naphtha by a stationary gas machine. *Anderson v. Savannah*, 69 Ga. 472.

²⁹ *Elkins v. McKean*, 79 Pa. St. 493; *Hourigan v. Nowell*, 110 Mass. 470.

³⁰ *Wellington v. Downer Kerosene Co.*, 104 Mass. 64.

³¹ *Carleton v. Lombard, etc., Co.* 149 N. Y. 137; 43 N. E. 422; rehearing denied 149 N. Y. 35; 44 N. E. Rep. 183.

³² *Carleton v. Lombard, etc., Co.*, *supra*.

which it was packed and from other sources the place* to which it was to be sent by the plaintiff, who purchased the oil from him, was held admissible, in an action for breach of an implied warranty that it was free from latent defects which would render it unmerchantable.³³ Where a statute provided that if any inspector or deputy falsely branded or marked any barrel, or was guilty of any fraud or culpable negligence, in the discharge of his official duties, he should be liable to the party injured for all damages resulting therefrom, it was held that intentional wrong or culpable negligence was essential to render such inspector or his deputy civilly liable, and that there must be a casual connection between the false branding to render him liable for the injury and damages of which complaint is made.³⁴

§680. Gas box in sidewalk.

A company empowered to manufacture, make and sell illuminating gas for a city or its streets, and any buildings, manufactories or houses therein, and to lay pipes in the streets for the purpose, is liable for an injury occasioned by a gas box in the sidewalk which furnishes access to a cock in the service pipe conducting the gas from the main to the house; for it is a part of the apparatus of the company over which it is bound to exercise proper care to prevent an injury to persons on the sidewalk.³⁵

§681. Negligence of contractor.

A gas company had the proper authority to lay its gas mains in the streets of a municipality, and contracted with one C. to

³³ Carleton v. Lombard, etc., Co., *supra*.

³⁴ Hatcher v. Dunn, 102 Iowa 411; 71 N. W. Rep. 343 (affirming on rehearing 66 N. W. Rep. 905); 36 L. R. A. 689. In this case it was also held that liability of the inspector and his sureties were purely statutory. It was also held that the fact that the oil was falsely

branded would not render the inspector liable, if the injury resulted from some other cause, such as the use of a defective and an unsafe lamp.

³⁵ Washington Gaslight Co. v. District of Columbia, 161 U. S. 316; 16 Sup. Ct. Rep. 564; affirming 20 D. C. 39; Loan v. Boston, 106 Mass. 450.

lay them. The contractor failed to properly refill the trench, and a horse fell into it and was injured. It was held that the owner of the horse could maintain his action against the gas company, on the ground that it was obliged to restore the streets to a safe condition; and that they could not escape liability by showing that they contracted with others to perform their duty for them.³⁶ And if a contractor building a sewer for the city injure the gas company's pipes, he will be liable to the company.³⁷ A contractor was to dig a trench in the street for a gas company under the supervision of the company's engineer. By a subcontract he passed the work to one Doris, who proceeded to dig the trench into which the plaintiff fell and broke his leg. Doris employed and supervised the hands who did the work, and the original contractor had no control over them. It was held that the original contractor was not liable.³⁸

§682. Streets rendered dangerous by laying gas mains.

A gas company is liable to any one injured by reason of its having torn up the streets of a city or town and not having taken sufficient precautions to protect the traveling public, the same as an individual; and it is no excuse that it has torn them up with the permission of the public authorities.³⁹ After the gas company has restored the streets to their former conditions as nearly as possible, it is not bound to keep them in repair thereafter.⁴⁰ A township in Pennsylvania is not liable for an explosion of gas in the highway escaping from a gas pipe,

³⁶ *McCamus v. Citizens' Gaslight Co.*, 40 Barb. 380; *Lebanon Light, etc., Co. v. Leap*, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342; *Ellis v. Sheffield Gas, etc., Co.*, 2 Ell. and B. 757; 18 Jur. 146.

³⁷ *In re Houghton*, 20 Hun 395; *Croft, etc., Gas Co. v. Pryor*, 31 Gas J. 386.

³⁸ *Wray v. Evans*, 80 Pa. St. 102.

³⁹ *Goodson v. Sunbury, etc.*, 75 L. T. Rep. 251; 60 J. P. 585; *Scott*

v. Manchester, 2 H. and N. 204; 26 L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598; *Hornby v. Liverpool, etc., Gas Co.*, 47 J. P. 231; *Whallen v. Citizens' Gaslight Co.*, 63 N. Y. Rep. 317; 30 N. Y. Supp. 1077; *Pine Bluff, etc., Co. v. Derreuisseaux*, 56 Ark. 132; 19 S. W. Rep. 428.

⁴⁰ *Grundy v. Janesville*, 84 Wis. 574; 54 N. W. Rep. 1085.

where there is no evidence that the township authorities ever knew there was a gas pipe in such highway.⁴¹ Where a horse was frightened by reason of the noise caused by a well, and the wagon it was drawing came in contact with a long exposed gas pipe in the highway, occasioning an injury thereby to the plaintiff, the gas company owning it was held liable.⁴² If a gas company so imperfectly fill up a trench in which it has laid its gas main that the filling subsides and leaves a hole in the street, it will be liable to any one, without fault, falling into the hole and injured thereby, even though the work had been approved and accepted by local authorities. It is not only the duty of the company to put the street in as good condition as it was before, but also to exercise a careful foresight in order to prevent any injury afterwards which might be occasioned to the work by storms and rainfalls, and which would render the work dangerous to travelers.⁴³ If the gas company open a hole in the sidewalk necessary to the prosecution of its work, it must see that it is properly protected.⁴⁴

§683. Imperfectly constructed gas building.

A person was employed as a master machinist. A fire occurred in the gas room of the company; and he was directed by a superior to break down a door. He did as directed; but a wall fell on him and killed him. It was claimed that several times the roof had burned off the building, and after the last fire an iron roof supported by heavy girders had been put on the building. It was also claimed that the previous fires had

⁴¹ *Otto Township v. Wolf*, 106 Pa. St. 608.

⁴² *Potter v. Natural Gas Co.*, 183 Pa. St. 575; 39 Atl. Rep. 7.

⁴³ *Dillon v. Washington Gaslight Co.*, 1 MacArthur (D. C.) 626; *Robinson v. Imperial, etc., Co.*, 15 Gas J. 883; *Weld v. Gaslight Co.*, 1 Starkie 150; *Chisholm v. Halifax*, 29 Nov. Sco. 402.

⁴⁴ *Buesching v. St. Louis, etc., Co.*,

73 Mo. 219; 11 Rep. 675, reversing 6 Mo. App. 85.

An agreement that the trench shall be "well and sufficiently closed up" and the land and premises "made good" is not complied with where the soil covering the pipes is in places from two to two and a half feet above the original level. *Chisholm v. Halifax, supra*.

so weakened the wall that it was not able to support the iron roof and girders; and that these girders expanded because of the fire, and the gable being weak, it all tended to cause the wall to fall. It was held that as the complaint did not show the deceased was not acquainted with all the defects and risks, or had been lately employed, or that the wall became weak during his employment or he did not have charge of that particular part of the building, and consequently out of his line of duty, or the gas room was unfit for the purpose for which it was constructed, the complaint was deficient.⁴⁵

§684. Exploding tank injuring servant.

A railroad company had its own gas plant, to manufacture gas it used. The person who was killed by it exploding was employed by the company before it was built. The railroad company organized a voluntary fire department composed of its employees; and the person killed was its chief. No one was required to join the fire company. The object of its formation was to extinguish fires breaking out in the railroad shops. The railroad company located the water plugs and pipes, furnished the fire apparatus, permitted the persons composing the fire company to drill frequently during working hours, during which hours they were paid their regular wages. Once a week the chief was allowed an hour to inspect the shops as a precaution against fire. The chief was killed by an explosion of the gas plant when endeavoring to put out a fire in the shops. He had nothing to do with the manufacture of the gas, being employed only as a machinist, although he frequently repaired the gas plant. It was claimed that the railroad company had negligently used a tar roof when it should have used a slate or a metal one; and that the gas tanks were too close to the fire in the gas retorts. The gas tanks were twelve feet from the gas retorts, and were separated by a brick wall. Metal roofs were

⁴⁵ *Allen v. Augusta Factory*, 82 Ga. 76; 8 S. E. Rep. 68; *Hulett v. Pudsey Gas Co.*, 28 Gas J. 663. See *as to fall of a gate, Allen v. New Gas Co.*, L. R. 1 Exch. Div. 251; 45 L. J. Exch. 668.

generally in use on such buildings, where roofs were used. On the ground that the negligence of the railroad company must have been a reckless indifference to the safety of the public to render it liable, or an intentional failure to perform a manifest duty, the company was held not liable.⁴⁶

§685. Servant entitled to safe place in which to work.

A servant is entitled to a safe place in which to work. Thus where a contractor had one "gang" of men digging a trench and another laying pipe in the same trench; and a servant with the latter gang was assured by the master that the trench was a safe place in which to work, and there was nothing to indicate that it was unsafe, the master was held liable to the servant for injuries he received by the walls of the trench caving in upon him.⁴⁷ A servant of a gas company dug a trench in front of a boiler, and left it in an unsafe condition. Another servant who fired the furnace under the boiler, and who in so doing had to work near the trench, was injured because of its unsafe condition. It was held that as the injured servant assumed only such risks as were incident to his employment, and such as were apparent and the ordinary risks, he did not assume the risk of the hole in front of the boiler, and was entitled to recover.⁴⁸ It was held differently where a trench was dug by a city, which the master had no control over and never saw, and the city ordered the master to remove some gas pipe from the trench, and to comply with the order sent the servant to do so, and in doing so the earth caved in and injured him.⁴⁹ A servant of a gas company assisted in raising a gas tank over a building. In doing so some boards were left on a scaffold built along the wall of the building over which the tank was to be raised. The boards were loose and in an unsafe condition, and fell because

⁴⁶ *Collins v. Cincinnati, etc., Co.*, 13 Ky. Rep. 670; 18 S. W. Rep. 11.

⁴⁷ *Schmidt v. Gillen*, 41 N. Y. App. Div. 302; 58 N. Y. Supp. 458; *Baird v. Reilly*, 92 Fed. Rep. 884.

⁴⁸ *Frye v. Bath Gas, etc., Co.*, 94 Me. 17; 46 Atl. Rep. 804.

⁴⁹ *Hughes v. Malden, etc., Co.*, 168 Mass. 397; 47 N. E. Rep. 125.

the foreman failed to steady the tank which shook them. They fell and injured the servant; and it was held that the company was liable, on the theory that the master was bound to furnish the servant a safe place in which to work, and was bound to remove the boards that caused the injury.⁵⁰

§686. Servant injured by use of defective ladder.

A servant of a gas company was directed to remove some boards which were over a gas generator. To do this he had to use a ladder; and he used one that was shorter than the one he was directed to use. He ascended to the place directed, the ladder was too short to reach it, but he used other means. He was overcome with gas that had accumulated at the place to which he was directed to go and fell, receiving severe injuries from which he died. In an action brought to recover for his death on the ground that the place to which he was sent was a dangerous one, it was held to be immaterial whether the ladder was too short or not, for it had nothing to do with the fall; because the fall was caused by the inhalation of poisonous gases, and it could make no difference how he made his ascent.⁵¹ It was the duty of a servant to light the lamps in front of his master's residence, and to do this he had to use a ladder. The ladder was insecure because of the absence of spikes, and the servant told his foreman of that fact, who promised to put in proper spikes, but did not do it, and on being told a second time, made the same promise. The defect in the ladder continued, and the servant fell from it one stormy night and was injured. The fall was occasioned by the absence of the spikes. It was held that the master was not liable, for the reason that the work and use made of the ladder was only ordinary labor; and the servant was as familiar with the defects as his master.⁵² A

⁵⁰ Bagley v. Consolidated Gas Co., 13 N. Y. Misc. Rep. 6; 34 N. Y. Supp. 187.

⁵¹ Citizens' Gaslight, etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

⁵² Marsh v. Chickering, 101 N. Y. 396; 5 N. E. Rep. 56. The court said that the rule applicable to complicated machinery did not apply.

servant of a gas company had for several years been employed to make general repairs. By one in authority he was directed to clean a condenser. To get to the place to do the cleaning he had to use a ladder, and used one furnished by the company. The ladder had no spikes in the end resting on the floor, and the place where it rested was smeared with grease and oil. When the servant was ascending, it slipped, he was thrown to the ground, and injured. He claimed the injury was caused by the absence of the spikes. The servant, some time before the accident, had told the officers of the gas company that the ladder was unsafe. It was held that the attempt to ascend the ladder under the circumstances was negligence, if not recklessness, and a bar to a recovery; for the servant knew the facts as well as the master.⁵³

⁵³ *Corcoran v. Milwaukee, etc., Co.*, 31 Wis. 191; 51 N. W. Rep. 328

CHAPTER XXXI.

INSURANCE.

- §687. Extent of discussion.
- §688. Conflict between rider or written part and printed part of policy.
- §689. "On the premises."
- §690. "Contiguous" to insured building.
- §691. Oil for illumination.
- §692. Time of filling lamps.
- §693. Failure to extinguish lamps.
- §694. The oil prohibited.
- §695. Prohibited user not occasioning loss.
- §696. Owner himself must violate terms of policy.—Tenant.
- §697. Explosions.—No clause of exemption.
- §698. Explosions of oil or gas.
- §699. Failure to disclose use of oil.
- §700. Warranty.—Hazard not increased.
- §701. Particular use allowed.
- §702. Extent of prohibited use.
- §703. Occasional use of hazardous articles.
- §704. Increase of risk.
- §705. Proof of custom or the usual practice.
- §706. Implied consent to prohibited use.—Custom.
- §707. "Storing."—"Keeping."
- §708. Store.
- §709. Grocery.
- §710. Watchmaker.
- §711. Furniture store.—Wagonshop.
- §712. Factory.
- §713. Drug store.
- §714. Laundry.
- §715. Patent leather factory.
- §716. Painter.—Paintshop or factory.
- §717. Torch to remove paint from house.
- §718. Cleaning clothes.—Destroying vermin.
- §719. Cleaning or lubricating machinery.
- §720. Waiver by knowledge or acquiescence in use of building.
- §721. Waiver by knowledge or acquiescence in use of building — Continued.
- §722. Waiver by receiving premium with knowledge of prohibited user.
- §723. Waiver by adjusting loss or accepting proof without objection.

- §724. Insurance company's right of action to recover damages.—Effect of insurance on right of action.
- §725. Gas company causing fire liable to insurance company.
- §726. Inhaling gas, accident or life insurance policy.

§687. Extent of discussion.

Necessarily, the extent of the discussion of the subject matter of this chapter must be brief, and only insurance cases be cited. Little, if any, methodical order can be followed. Usually litigation concerning the use or storage of oil in the insured building arises over the difference between the printed terms and the written clauses of the policy, or because of the conflict between the "rider" and the terms of the policy proper. The custom of trade, too, must be taken into consideration, for it has a very decided bearing upon the interpretation of fire insurance policies.

§688. Conflict between rider or written part and printed part of policy.

A "rider" is always something attached to a policy, and is an addition to it, either by expressly changing the terms of the policy or adding thereto. It is regarded as the last expression of the parties to the policy. In case of a conflict between the language of the policy and rider, the latter will control; just as in case there is a conflict between the printed portions of a policy and written words inserted in it, the latter will control, if the two cannot be construed together.¹

§689. "On the premises."

It is sometimes difficult to determine whether or not the prohibited article has been kept on the premises within the

¹ *Yoch v. Home, etc., Ins. Co.*, 111 Cal. 503; 44 Pac. Rep. 189; 34 L. R. A. 857; *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. St. 497; 33 Am. Rep. 778; *Gunther v. Liverpool, etc., Ins. Co.*, 85 Fed. Rep. 846; *Russell v. Manufacturers', etc., Ins. Co.*, 50 Min. 409; 52 N. W. Rep. 906; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789; *Faust v. American Fire Ins. Co.*, 91 Wis. 158; 64 N. W. Rep. 883; 30 L. R. A. 783.

meaning of a provision prohibiting the keeping of such an article "on the premises." It is clear that such a phrase cannot be so extended as to include a building other than the one covered by the policy, so that keeping the prohibited article in such building will not avoid the policy.² The keeping of gasoline in the yard twelve feet from the insured building is not a breach of a condition of a policy which prohibits the storage or use of gasoline in or on the premises.³ Nor is such a policy avoided by the storage of the gasoline in a tank underground thirty-five feet from the insured building, where by means of certain machinery it is vaporized and the vapor carried into the building by a pipe and used for lighting.⁴ A policy placed on a "three-story brick gravel roof hotel building, occupied by the assured," and known as the Tremont Hotel, situated on lots 9 and 12 gave permission "to light premises with gasoline," but provided that "no gasoline should be stored on the premises." It was held that the word "premises" meant the building insured, and the insured was not prohibited from depositing gasoline for the use of the hotel, in reasonable quantities, on his own lots outside the hotel.⁵ A policy on a specifically described steam flour mill and machinery prohibited the keeping of petroleum on "the premises." The insured kept a barrel of petroleum in an engine house adjoining, but not included in the specific description of the premises. The fire that destroyed the mill originated in it and not in the engine room. It was held that the petroleum had not been kept on "the premises," and that the policy was not avoided.⁶ The use of naphtha for four weeks to burn off the paint on the outside of a house, using it within a few inches of the outer wall, is the bringing of naphtha

² *Sperry v. Insurance Co.*, 22 Fed. Rep. 516. See *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745; 73 N. W. Rep. 291. *Commerce Ins. Co.*, 69 N. Y. 191; 25 Am. Rep. 168, affirming 7 Hun 455.

³ *La Force v. Williams, etc., Ins. Co.*, 43 Mo. App. 518. ⁵ *Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446.

⁴ *Queen Ins. Co. v. Sinclair*, 1 Ohio Cir. Ct. Rep. 496; *Arkell v. Carlin v. Western, etc., Co.*, 57 Md. 515; 40 Am. Rep. 440.

“on the premises.”⁷ Permission was given to remove insured goods to “the three-story . . . building occupied as a . . . store, situated at No. 72 E. Street.” Just back of the three-story building was a one-story addition which opened into it by a door and window, which was included under the street number 72. For a long time previous to the granting of the permission the addition was occupied as a part of the store, and in it some of the insured goods were put. It was held that this addition was such a part of the premises as to prohibit the keeping of gasoline in it.^{*7} In this instance the gasoline was kept and used in a gasoline stove in an upstairs room which had no connection with the store, and was reached by an outside stairway. A policy provided that it should be void if illuminating gas or vapor should be generated in the building or adjacent thereto, to use therein. The insured manufactured a gaseous fluid from gasoline and other ingredients, which was kept in a shed separated from the insured building, and used in a lamp for lighting, a portion of it being kept on a shelf in the back part of such building. The insured had used all the fluid several days before the fire occurred, and was not using it at the time of the fire. It was held that the facts warranted a finding that no illuminating gas was generated in the building for use therein.⁸ Where the policy prohibited the using or depositing of oil on the premises, the policy covering the house only; and the gasoline was kept in the barn and brought into the house as needed and there used, it was held that the policy was thereby avoided.⁹

§890. “Contiguous” to insured building.

A policy prohibited “the generating or evaporating within the building, or contiguous thereto, of any substance for a burn-

⁷ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587.

^{*7} Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455; 83 N. W. Rep. 124.

⁸ Phoenix Ins. Co. v. Shearman, 17 Tex. Civ. App. 456; 43 S. W. Rep. 930, 1063.

⁹ Pennsylvania Ins. Co. v. Faires, 13 Tex. Civ. App. 111; 35 S. W. Rep. 55.

ing gas, or the use of gasoline for lighting." After the policy was issued, the insured constructed works fifty feet from the building for the manufacture of gas from gasoline; and the gas when manufactured was conducted to the building by pipes. It was held that the policy was not avoided, for the gas works were not "contiguous" to the building, within the meaning of the clause quoted.¹⁰

§691. Oil for illumination.

The prohibition against the use of enumerated oils upon the premises will not, as a rule, prohibit their use for necessary illuminating purposes. Such was held to be the case of the use of naphtha,¹¹ and of kerosene.¹² Where a clause in a policy prohibited the storing or use of "petroleum, rock or earth" oil on the premises, and another clause prohibited the lighting of the premises by means of certain inflammable substances, not including kerosene, lighting the building with kerosene, and keeping on hand in it a reasonable quantity for that purpose, was held not to avoid the policy.¹³

§692. Time of filling lamps.

Where the use of oil is expressly permitted for illuminating purposes, a clause is frequently inserted providing when the lamps must be filled, almost universally requiring that work to be performed in the day time. A violation of such a provision avoids the policy. Thus where a policy required the lamps "to be filled and trimmed by daylight," it was held that the policy was avoided by the drawing on the premises of carbon oil to loan to a neighbor about dusk, near a lighted lantern, though not

¹⁰ Arkell v. Commerce Ins. Co., 69 N. Y. 191; 25 Am. Rep. 168; affirming 7 Hun 455.

¹¹ Putnam v. Commonwealth Ins. Co., 4 Fed. Rep. 753.

¹² Jones v. Howard Ins. Co., 117 N. Y. 103; 22 N. E. Rep. 578; 10 N. Y. St. Rep. 120; Bennett v.

North British, etc., Co., 8 Daly 471; Hall v. Insurance Co., 58 N. Y. 292; 17 Am. Rep. 255; Bennett v. North British, etc., Ins. Co., 81 N. Y. 273; 37 Am. Rep. 501.

¹³ Buchanan v. Exchange Fire Ins. Co., 61 N. Y. 26.

for the purpose of filling lamps, by any person acting for the insured, whereby a fire was caused, the policy only permitting carbon oil to be used on the premises for lighting purposes.¹⁴ But where a policy provided that the insurer should not be liable for a loss caused by the use of kerosene, unless permitted on the policy in writing, it was held that a recovery on the policy could not be defeated on the ground that lamps were filled with kerosene in the evening, and by artificial light, unless it was shown that the loss was occasioned thereby.¹⁵ So where the policy prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight, it was held that it was not avoided by using lard oil and candles, and filling the lamps with it at night.¹⁶

§693. Failure to extinguish lamps.

A policy granted the privilege of using kerosene oil for lights in the day time, and provided that they should be extinguished at the close of the day's business. It was held that the mere fact that at some time during the life of the policy the insured failed to extinguish the lamps at the close of the business of the day could not prevent a recovery, unless the risk by such failure was increased; for the reason that the doing of an act which the policy prohibits for the manifest purpose of preventing an increase of the risk will not work a forfeiture.¹⁷

§694. The oil prohibited.

If a particular kind of oil is prohibited, then the keeping of another kind will not avoid the policy. Thus prohibiting the use of camphene, spirit gas, burning fluid, or chemical oils, but

¹⁴ *Gunther v. Liverpool, etc., Ins. Co.*, 134 U. S. 110; 10 Sup. Ct. Rep. 448; *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113; 34 Fed. Rep. 501.

¹⁵ *Jones v. Howard Ins. Co.*, 117 N. Y. 103; 22 N. E. Rep. 578.

¹⁶ *Carlin v. Western, etc., Co.*, 57 Md. 515; 40 Am. Rep. 440.

¹⁷ *Fireman's Ins. Co. v. Cecil*, 12 Ky. L. Rep. 48, 259.

permitting the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps be filled by daylight, will not prohibit the use of lard oil and candles, even though the lamps be filled at night.¹⁸ But a clause prohibiting the keeping of petroleum will prohibit the keeping of gasoline, for gasoline is a product of petroleum, though it be not named in the policy as a prohibited article.¹⁹ In the absence of proof a court cannot hold kerosene oil to be a "burning fluid or chemical oil."²⁰ "French Electric Fluid" has been held to be the equivalent of benzine.²¹ Whether benzine was a "burning fluid or chemical oil" within the meaning of a policy on a distillery forbidding the assured to keep or have "camphene, spirit gas, or any burning fluid or chemical oils" on the premises was held to be a question of fact.²² A policy provided that "camphene, spirit gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils" should not be kept or used on the premises, but this was held not to prevent the use of kerosene oil, the phrase "crude or refined coal or earth oils" being limited by the remaining words in the sentence in which they were used so as not to prohibit the use of kerosene.²³ Where an assured, thinking he was using a mixture of sperm and lard oils, for lubricating purposes, when in fact he was using a compound of those oils with petroleum, which was equally as safe, it was held that there was no breach of a condition of the policy that only sperm and lard oils should be used.²⁴

¹⁸ *Carlin v. Western, etc., Co.*, 57 Md. 515; 40 Am. Rep. 440.

¹⁹ *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590.

²⁰ *Mark v. National Fire Ins. Co.*, 24 Hun 565.

²¹ *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456; 43 S. W. Rep. 930, 1063.

²² *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647.

²³ *Morse v. Buffalo, etc., Ins. Co.*, 30 Wis. 534; 11 Am. Rep. 587.

²⁴ *Copp v. German-American Ins. Co.*, 51 Wis. 637; 8 N. W. Rep. 127, 616.

A prohibition against the keeping of nitroglycerine was held to exclude giant powder, the evidence showing that the latter was almost wholly composed of the former. *Sperry v. Springfield, etc., Ins. Co.* 26 Fed. Rep. 234; 15 Ins. L. Jr. 270.

§695. Prohibited user not occasioning loss.

Whether or not the user of the prohibited article occasioned the loss is an immaterial question; for if the article be used contrary to the terms of the policy, it will avoid such policy, although the loss be occasioned by another and distinct cause.²⁵ But where a policy provided that the insurer "will not be liable under or by virtue of this policy for loss or damage caused by the working of mechanics . . . nor for the use of kerosene . . . unless permitted hereon in writing"; and it was claimed that the insured violated the policy by filling his lamps with kerosene in the evenings, by artificial light; it was held that as the fire and the consequent loss did not have its origin from the use of the kerosene the insurer was liable.²⁶ So it has been held that if gasoline was brought upon the premises contrary to the prohibitory clause of the policy, but it was not there when the loss occurred, the policy was not thereby avoided, although if it had been there when the fire occurred, the policy would have been avoided.²⁷ So where kerosene could only be used for lighting purposes, but it was used for fuel purposes, the company was held liable, the use of the kerosene not causing the fire.²⁸

²⁵ *Pennsylvania Fire Ins. Co. v. Faibles*, 13 Tex. Civ. App. 111; 35 S. W. Rep. 55; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Faulker v. Central Fire Ins. Co.*, 1 Kerr (N. B.) 279; *Trustees, etc., v. Williamson*, 26 Pa. St. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Couch v. Rochester, etc., Ins. Co.*, 25 Hun 469; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Diehl v. Adams County, etc., Ins. Co.*, 58 Pa. St. 443; *Murdock v. Chenango, etc., Ins. Co.*, 2 N. Y. 210; *White v. Western, etc., Co. (Pa.)*, 6 Atl. Rep. 113.

²⁶ *Jones v. Howard Ins. Co.*, 117 N. Y. 103; 22 N. E. Rep. 578.

²⁷ *Traders' Ins. Co. v. Catlin*, 163 Ill. 256; 45 N. E. Rep. 255; 59 Ill. App. 162. See *New England, etc., Ins. Co. v. Wetmore*, 32 Ill. 221; *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599; 22 N. E. Rep. 489; *Phoenix, etc., Co. v. Munger (Tex. Civ. App.)*, 49 S. W. Rep. 271.

See the rather remarkable case of *Traders' Ins. Co. v. Race*, 142 Ill. 338; 31 N. E. Rep. 392.

²⁸ *Snyder v. Dwelling House Ins. Co.*, 59 N. J. L. 544; 3 Atl. Rep. 1022, reversing 34 Atl. Rep. 931.

§696. Owner himself must violate terms of policy.—Tenant.

The rule is, to avoid a policy, the insured himself must have done the act prohibited by it, or, at least, suffered others to do it. Thus where workmen in a factory used friction matches to some extent contrary to orders of the insured, the court instructed the jury that the use of matches contemplated by the policy to render it void must have been a use by authority, express or implied, of the insured; that what was going on in the premises he was bound to know; that if he knew, or as a prudent man ought to have known, that matches were used, then his order would not help him; and that the use meant was a known and permitted use. These instructions were held to be correct.²⁹ But if a person occupying the premises with the consent of the insured, as his tenant, for instance, violates the prohibitory clause of the policy, his act is the act of the insured.³⁰ The fact that the breach of the policy occurred through the orders of the husband and general manager of the tenant of the assured, although he was not acting by express or implied authority from such insured, was held not to relieve him from the responsibility for the breach of the prohibitory condition.³¹

§697. Explosions.—No clause of exemption.

If there be no clause in the policy exempting the insurer from loss occasioned by an explosion, then such insurer will be liable for the loss. Thus where a policy had no such exempting clause, and a match was applied to a keg of powder which exploded, threw off the roof of the insured building, and did

²⁹ *Farmer, etc., Ins. Co., v. Simmons*, 30 Pa. St. 299.

³⁰ *German Fire Ins. Co. v. Board*, 54 Kan. 732; 39 Pac. Rep. 697; *Kelly v. Worcester, etc., Ins. Co.*, 97 Mass. 284; 5 *Benn. Fire Ins. Co.*, 122; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Badger v. Platts*, 68 N. H. 222; 44 *Atl. Rep.* 296; *Kohlmann v. Selvage*, 34 N. Y. App. Div.

380; 54 N. Y. Supp. 230 (landlord did not know tenant was using gasoline for a light); *Adair v. Southern etc., Ins. Co.*, 107 Ga. 297; 33 S. E. Rep. 78.

³¹ *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113; 6 *Sup. Ct. Rep.* 306; *Gunther v. Liverpool Ins. Co.*, 85 *Fed. Rep.* 846.

other damage, the insurer was held liable.³² A clause in a policy provided that the insurer should not be liable "for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." The building insured was destroyed by fire, which was the immediate result of an explosion; and the insurer was held liable, the court saying of the policy: "It secures exemption from liability from losses caused by explosions, but not from liability for losses by fire caused by explosions."³³

In a Missouri case the following language was used, which shows the line of reasoning in cases of this kind: "If fire was the direct and proximate cause of the damage, the responsibility therefor becomes fixed. It would make no difference whether it manifested itself in combustion or explosion. . . . The explosion of a coal oil lamp, caused by the generating of gas, may not in a moment communicate the fire to the entire building, but it may result in as complete destruction as the ignition of gas, which permeates every part of the building, and destroys the whole by an instantaneous blaze. Powder may be ignited either in quantities only sufficient to communicate fire to combustible materials around it, or sufficient to demolish the largest building. There would be only a difference in degree between the one and the other. No reason can be seen why an exception to an indemnity against loss by fire should be made because the work of destruction is instantaneous and by explosion, rather than through the slow process of gradual communication and combustion."³⁴

³² *Scripture v. Lowell, etc., Ins. Co.*, 10 Cush. 356; *Waters v. Merchants' etc., Ins. Co.*, 11 Pet. 213; *Hobbs v. Guardian, etc., Co.*, 12 Can. Sup. Ct. 631.

³³ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; 20 Atl. Rep. 698; *Renshaw v. Missouri, etc., Ins. Co.*, 33 Mo. App. 394; *Greenwald v. _____ Ins. Co.*, 3 Phila. 323; *City Fire Ins. Co. v. Cor-*

lies, 21 Wend. 367; *Boatman's Fire Ins. Co. v. Parker*, 23 Ohio St. 85.

³⁴ *Renshaw v. Missouri, etc., Ins. Co.*, 103 Mo. 595; 15 S. W. Rep. 945; *Aetna Ins. Co. v. Boon*, 95 U. S. 117; *American Steam, etc., Ins. Co. v. Chicago, etc., Co.*, 57 Fed. Rep. 294; 21 L. R. A. 572; *Boatman's, etc., Ins. Co. v. Parker*, 23 Ohio 85.

Although not liable for damages caused by an explosion, yet a com-

§698. Explosions of oil or gas.

The general rule is that the ordinary fire policies do not cover losses occasioned by explosions not directly connected with fire, such as a loss occasioned by the explosion of a steam boiler.³⁵ So, too, an explosion of gunpowder that wrecks a house is not such an act as a fire policy covers; and it cannot be said that the fire which ignited the powder was the fire insured against.³⁶ So where a policy provided that the insurance company should not be liable "for loss caused by . . . explosions of any kind unless fire ensues, and then for the loss or damage by fire only"; and vapors arising from the works in the mill insured, where the rectifying of spirits was carried on, came in contact with a burning lamp in the mill, left there by persons repairing the machinery, causing an instantaneous explosion, which blew off the roof of the mill, blew down the greater part of the walls, injured the machinery, and produced a fire which occasioned some damage, though slight compared with that caused by the explosion, it was held that the insurance company was liable only for the damages caused by the fire, and not for those caused by the explosion itself.³⁷ So where, under a like exemption clause, a mixture of whiskey vapor in a store insured and atmosphere came in contact with a gas jet and exploded, setting a fire in motion which destroyed the insured property; it was held that the loss was from the fire occasioned by the explosion, and that the company was not liable for it, and that the burning gas jet "was not such a fire as was contemplated by the parties as the peril insured against." The

pany is liable for the damages caused by the fire started by the explosion. *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; 20 Atl. Rep. 698.

³⁵ *Insurance Co. v. Tweed*, 7 Wall 44; *Waldeck v. Springfield, etc., Ins. Co.*, 56 Wis. 96; 14 N. W. Rep. 1; 12 Ins. L. Jr. 177; *St. John v. American, etc., Ins. Co.*, 11 N. Y. 516; 1 Duer 371; 3 Benn. Fire Ins.

Cas. 760; *Millaudon v. New Orleans Ins. Co.*, 4 La. Ann. 15; 3 Benn. Fire Ins. Cas. 4.

³⁶ *Everett v. London Assurance Co.*, *supra*; *Caballero v. Home Insurance Co.*, 15 La. Ann. 217; *German Ins. Co. v. Roost*, 55 Ohio St. 581; 45 N. E. Rep. 1097; 36 L. R. A. 236.

³⁷ *Briggs v. North American, etc., Ins. Co.*, 53 N. Y. 446.

court said: "The gas jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection. Although it was a possible means of putting such destructive force in motion, it was no more the peril insured against, than a friction match in the pocket of an incendiary."³⁸ The same was held where illuminating gas in a room was ignited by the striking of a match, for the reason that the explosion and not the lighting of the match was the proximate cause of the loss.³⁹ So where a loss was occasioned by a lighted fire being applied to some unknown substance placed in a doorway, which broke the windows, broke the door sill and slightly discolored some of the paint on the house, it was held that the company was not liable.⁴⁰ But where fire exists on the premises or on the premises adjacent thereto, and in its progress reaches an explosive, causing an explosion, from which loss results, the fire is the proximate cause of the loss, and the insurer liable.⁴¹ A policy of insurance provided that "neither will the company be responsible for loss or damage by explosion, except from explosion by gas." On the premises an inflammable and explosive vapor was evolved in the process of extracting oil from shoddy. The oil caught fire and afterwards exploded, causing a further fire, besides the damage by the explosion itself. It was held that the word "gas" as used in the policy meant illuminating coal gas, and that the insurer was liable for the damage caused by the exploding gas

³⁸ *United Life Ins. Co. v. Foote*, 22 Ohio St. 340; 2 Ins. L. Jr. 190.

³⁹ *Heuer v. Northwestern, etc.*, Ins. Co., 144 Ill. 393; 33 N. E. Rep. 411; *Heuer v. Winchester Fire Ins. Co.*, 151 Ill. 331; 37 N. E. Rep. 873; affirming 45 Ill. App. 239; *Tannert v. ———— Ins. Co.*, 34 La. Ann. 249; *Roe v. Columbus, etc.*, Ins. Co., 17 Mo. 301; *Montgomery v. Fireman's Ins. Co.*, 16 B. Mon. 427.

⁴⁰ *Phoenix Ins. Co. v. Greer*, 61 Ark. 509; 33 S. W. Rep. 840.

See on this same subject *Hobbs v.*

Guardian, etc., Co., 12 Can. Sup. Ct. 631; *Washburn v. Miami, etc.*, Ins. Co., 2 Fed. Rep. 633; 2 Flipp. 664; 9 Ins. L. Jr. 68; *Dowe v. Faneuil Hall Ins. Co.*, 127 Mass. 346; *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70; *Smiley v. Citizens', etc., Ins. Co.*, 14 W. Va. 33.

⁴¹ *Washburn v. Western Ins. Co.*, 2 Fed. Rep. 633; Fed. Cas. No. 17216; 9 Ins. L. Jr. 424; *Washburn v. Artisans' Ins. Co.*, Fed. Cas. No. 17212; 9 Ins. L. Jr. 68; *Orient Ins. Co. v. Leonard*, 120 Fed. Rep. 808.

which occurred in the course of the fire, but not for the damages caused by the explosion and the fires which it caused.⁴² Where a policy issued to an express company provided "that no loss is to be paid arising from petroleum or other explosive oils or in case of a collision; and a collision took place with a train loaded with petroleum, and the petroleum took fire and the fire consumed the goods insured, the insurer was held not liable.⁴³ Gasoline was kept in a retail store and tin store. The store was covered by a policy insuring the stock of goods, and to the policy was attached a written clause which included a grant of the privilege to keep a limited quantity of gasoline. The printed clauses of the policy excluded all liability for explosives of any kind, unless fire ensued, and then covered loss or damage by fire only. An explosion was caused by the gasoline, and for the loss thus incurred the insurer was held not liable.⁴⁴

§699. Failure to disclose use of oil.

If the insured does not reveal the fact at the time he secures insurance on his property that oil is habitually kept on the premises where it is situated or contiguous thereto, it may be such a misrepresentation as will avoid his policy. Such was held to be the case where the diagram of the property furnished by the insured and his application did not show that a building was contiguous to the one insured, and that it was used as a place for painting barrels, benzine being used and kept in it.⁴⁵

§700. Warranty.—Hazard not increased.

The description in a policy may amount to a warranty that the contents of the store insured are not hazardous merchandise. If such is the case, the keeping of a small quantity of the goods

⁴² *Stanley v. Western, etc., Co.*, L. R. 3 Exch. 71; 37 L. J. Exch. 73; 17 L. T. (N. S.) 513; 16 W. R. 369.

⁴³ *Imperial Fire Ins. Co. v. Fargo*, 95 U. S. 227.

⁴⁴ *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42; 22 Sup. Ct. Rep. 22, affirming 16 U. S. App. D. C. 241.

⁴⁵ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

declared in the policy to be hazardous will avoid the policy, although the risk be not thereby increased. Such was the case where the goods were described in the policy as a "stock in trade, consisting of not hazardous merchandise," and providing that if the store should be used for carrying on or exercising any trade or business or keeping merchandise denominated hazardous in the terms of the policy, or if the risk should be increased with the consent of the assured, it should be void.⁴⁶

§701. Particular use allowed.

If a policy provides that petroleum shall not be kept or used on the premises except for lighting purposes, the keeping or using of it on the premises as a fuel will avoid the policy.⁴⁷

§702. Extent of prohibiting usage.

As a rule the amount of use of the prohibited product is immaterial. Thus the temporary use of naphtha on a single occasion was held to avoid the policy.⁴⁸ Where no inquiry was made by the company at the time it issued a policy concerning the use of gasoline on the premises, the use of it thereafter in contravention of a prohibitory clause in the policy will avoid such policy, although it was used when the policy was issued.⁴⁹

§703. Occasional use of hazardous articles.

It has been held that the occasional use of articles denominated hazardous would not avoid a policy conditioned against

⁴⁶ Richards v. Protection Ins. Co., 30 Mo. 273.

⁴⁷ White v. Western, etc., Co., 18 W. N. C. (Pa.) 279; 6 Atl. Rep. 113.

⁴⁸ Wheeler v. Trader's Ins. Co., 62 N. H. 326, 450. (But it should be remarked that the naphtha was used in this case several times, and a cask of it was taken on the premises.) Matson v. Farm Building Fire Ins. Co., 73 N. Y. 310; 29

Am. Rep. 149, reversing 9 Hun 415; Heron v. Phoenix, etc., Ins. Co., 180 Pa. St. 257; 40 W. N. C. 55; 36 Atl. Rep. 740; 36 L. R. A. 517.

A casual deposit of the prohibited article in the building was held not to avoid the policy. Hynds v. Schenectady, etc., Ins. Co., 11 N. Y. 554; affirming 16 Barb. 119.

⁴⁹ McFarland v. St. Paul, etc., Ins. Co., 46 Minn. 519; 49 N. W. Rep. 253.

their use.⁵⁰ The temporary use of benzine to renovate furniture and carpets will not avoid a policy, although the risk thereby be increased contrary to its terms.⁵¹

§704. Increase of risk.

Not infrequently policies provide that any increase of the hazard assumed by the insurer shall avoid the policy. Whether or not the particular thing done, and which it is insisted avoids the policy, increased the hazard is a question for the jury.⁵² Where the policy provided that it should be void if the hazard was increased, or any of the products of petroleum of a greater inflammability than kerosene were used or kept on the premises; and when the policy was issued the insured was using coal as a fuel, and afterwards he substituted for the coal a "reduced oil" of less inflammability than kerosene, it was held that the only question was as to the method of using the oil, and whether the hazard was thereby increased.⁵³ A clause in a policy avoided it if there was an increase of the hazard. For several months before the fire the insured kept in a room where the merchandise insured was situated, a jug containing crude petroleum for medical purposes. The petroleum did not cause and had nothing to do with the fire; but the evidence tended to show that its presence was dangerous, and tended to increase the risk. It was held error for the court to refuse to charge the jury that if the risk was actually and materially increased it avoided the policy.⁵⁴ Evidence is admissible to show that the occupation of the premises for finishing chairs, wherein an alcohol lamp was used and exploded, causing the fire, that

⁵⁰ Merchants', etc., Ins. Co. v. Washington, etc., Ins. Co., 1 Handy 408; La Force v. Williams, etc., Co., 43 Mo. App. 518.

⁵¹ Bently v. Lumberman's Ins. Co., 191 Pa. St. 276; 43 Atl. Rep. 209.

⁵² Pool v. Milwaukee, etc., Ins. Co., 91 Wis. 530; 65 N. W. Rep.

54; Williams v. People's Fire Ins. Co., 57 N. Y. 274; Atherton v. British, etc., Co., 91 Me. 289; 39 Atl. Rep. 1006.

⁵³ Grand Rapids etc., Co. v. American Fire Ins. Co., 93 Mich. 396; 53 N. W. Rep. 538.

⁵⁴ Williams v. People's Fire Ins. Co., 57 N. Y. 274.

the risk was thereby increased.⁵⁵ A policy prohibiting the keeping of baled hay is avoided by keeping large quantities of loose unbaled hay; for the reason that loose hay is more hazardous than baled hay.⁵⁶ To put up a frame building near the one insured in which is placed an incubator heated by the use of gasoline or kerosene as a fuel is to increase the risk of the insurer.⁵⁷ Where gasoline had been kept in violation of the terms of the policy, but at the time of the fire none were on the premises, it was held to be a question of fact, on which the testimony of experts was admissible, whether the risk had been increased; and the effect of the changed condition on the premium rate which should have been charged by underwriters generally for the insurance of the property may be shown as bearing on the issue, though it is not conclusive.⁵⁸

§705. Proof of custom or the usual practice.

As a rule proof is admissible to show what was the custom or usual practice with reference to the keeping of prohibited articles where it is claimed that the nature of the property insured was such that the articles prohibited were a necessary part of the whole. As in the case of a country store, proof is admissible, in an action on the policy, to show custom or practice with reference to the keeping of prohibited articles, such as gasoline.⁵⁹ But if there is an express provision that a certain oil shall not

⁵⁵ *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253.

⁵⁶ *Dittmer v. Germania Ins. Co.*, 23 La. Ann. 458; 8 A. M. Rep. 600.

⁵⁷ *Yentzer v. Farmers', etc., Ins. Co.*, 200 Pa. St. 325; 49 Atl. Rep. 767.

⁵⁸ *Traders' Ins. Co. v. Catlin*, 163 Ill. 256; 45 N. E. Rep. 255, reversing 59 Ill. App. 162. See *Cornish v. Farm, etc., Ins. Co.*, 74 N. Y. 295; *Planters', etc., Ins. Co. v. Rowland*, 66 Md. 236; 7 Atl. Rep. 257; *Luce v. Dorchester, etc., Ins.*

Co., 105 Mass. 297; *Lietch v. Atlantic, etc., Ins. Co.*, 66 N. Y. 100.

⁵⁹ *American, etc., Ins. Co. v. Green*, 16 Tex. Civ. App. 531; 41 S. W. Rep. 74; *Mascott v. Granite, etc., Ins. Co. (Vt.)*, 35 Atl. Rep. 75; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835; *Hall v. Insurance Co.*, 58 N. Y. 292; 17 Am. Rep. 255; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Tubb v. Liverpool, Etc., Ins. Co.*, 106 Ala. 651; 17 So. Rep. 615.

be kept or permitted on the premises, then the keeping of it for trade will avoid the policy.⁶⁰

§706. Implied consent to prohibited use.— Custom.

An implied consent to use the buildings in a manner prohibited by the policy may be drawn from the use to which the building was being put at the time the policy was issued, or from the nature of the stock insured. Thus where keeping gunpowder was prohibited, yet the store insured was such a store as usually contains gunpowder for retail; and at the time the policy was issued the insurance agent knew gunpowder was actually kept for that purpose in the store, it was held that the keeping of the amount usually carried by retail storekeepers did not avoid the policy.⁶¹ So where a policy placed with a silver plating company on its stock and machinery in its factory, provided "that the entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void (anything contrary, notwithstanding) if there be kept, used, or allowed on the above described premises . . . gasoline," was held not to prohibit the use of gasoline in the company's business, it being so used at the date of the policy, and the use being necessary. The fact that only such amount was brought into the factory at any one time as was used in a single day seems to have had some bearing on the decision.⁶² A policy containing a provision declaring it to be void if gasoline be "kept, used or allowed" on the premises does not prohibit the

⁶⁰ *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147. In this case a barrel of petroleum was kept for sale in a store.

⁶¹ *Kenton Ins. Co. v. Downs*, 90 Ky. 236; 13 S. W. Rep. 882; *Mascott v. Granite, etc., Ins. Co. (Vt.)*, 35 Atl. Rep. 75; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 23 S. E. Rep. 463; *Stout*

v. Commercial, etc., Co., 12 Fed. Rep. 554; 11 Biss. 309; 11 Ins. L. J. 688. See *Sperry v. Springfield, etc., Ins. Co.*, 26 Fed. Rep. 234; 15 Ins. L. J. 270; and *Steinbach v. Relief Ins. Co.*, 77 N. Y. 498, affirmed 13 Wall 183; *Steinbach v. Lafayette Ins. Co.*, 54 N. Y. 90.

⁶² *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151; 37 W. N. C. 39; 32 Atl. Rep. 613; *Northern, etc., Co. v. Crawford*, 24 Tex. Civ. App. 574; 59 S. W. Rep. 916.

keeping in the building gasoline to be used in filling gasoline torches for use in removing paint from the building, in order to repaint it.⁶³ Under a policy placed on household and kitchen furniture and family stores, a clause prohibiting gasoline on the premises will not prevent the use of gasoline in the kitchen gasoline stoves, it being shown that household and kitchen furniture ordinarily include gasoline and gasoline stoves.⁶⁴ It was held that the prohibitory clause was repugnant to the general tenor of the policy when applied to the articles insured.⁶⁵ Where a policy on a store prohibited the use of any burning fluid or chemical oils, and a subsequent clause permitted the use of kerosene oil as a light in the dwelling part of the building, the use of kerosene in the store rendered the policy void, although the owner slept in the store with his clerk, and kept the kerosene lamps burning as a protection against burglars.⁶⁶ A house was insured and then changed into a grocery, in which articles were sold which were denominated "hazardous." This was held to avoid the policy.⁶⁷

§707. "Storing."—"Keeping."

Fire insurance policies usually prohibit the storing of oils upon the premises of the property insured; and not infrequently the question arises what is a "storing" of oil. Usually the keeping of enough oil for the retail trade, as retailers are in the habit of doing, will not avoid a policy prohibiting the "storing" of oil. Thus a grocer may keep such oils in reasonable quantities as grocers usually keep and which is incidental to his business, although there be a clause in his policy suspending

⁶³ *Smith v. German Ins. Co.*, 107 Mich. 270; 65 N. W. Rep. 236; *Ackley v. Phoenix Ins. Co.*, 25 Mont. 272; 64 Pac. Rep. 665.

⁶⁴ *American, etc., Ins. Co. v. Green*, 16 Tex. Civ. App. 531; 41 S. W. Rep. 74; *Snyder v. Dwelling House Ins. Co.*, 59 N. J. L. 544; 37 Atl. Rep. 1022.

⁶⁵ It is different if fireworks are kept in the dwelling house. *Heron v. Phoenix, etc., Ins. Co.*, 180 Pa. St. 257; 40 W. N. C. 55; 36 Atl. Rep. 740; 36 L. R. A. 517.

⁶⁶ *Cerf v. Home Ins. Co.*, 44 Cal. 320; 13 Am. Rep. 165.

⁶⁷ *Davern v. Merchants', etc., Ins. Co.*, 7 La. Ann. 344.

its operations if oils be stored in the building.⁶⁸ Even the keeping of gasoline for retail, in reasonable quantities, will not avoid the policy, although it be denominated extra hazardous as an article of storage.⁶⁹ Where the assured is prohibited "from using the premises for the purpose of keeping or storing therein any goods or merchandise of the kind which are denominated hazardous," the keeping of articles in the stock of goods insured which are of a hazardous character, but which are required by the ordinary course of his trade will not avoid the policy, for such a provision is merely a protection against the appropriation of the store for a depository of such goods, as a sole or principal business.⁷⁰ In such an instance the keeping of a barrel of oil for a short time in the back of the store, with bunches of cotton yarn near it, was held not to prevent a recovery for loss by fire of the goods insured.⁷¹ A policy denominated flax as hazardous, and provided that the building should not be "appropriated, applied or used" for that purpose. The building insured had been used for flax dressing machinery, but before the policy was issued it had been removed and a cording machinery put in. A small quantity of unbroken flax remained piled up in a corner of a room two days, during which the building was burned. It was held that these facts did not show that the building was "appropriated, applied or used" for storing or keeping flax.⁷² A policy provided that if the premises insured "be used for the purpose of carrying on any trade, business or vocation denominated hazardous, or extra hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy, or conditions denominated

⁶⁸ *New York, etc., Ins. Co., v. Langdon*, 6 Wend. 623; *Langdon v. New York, etc., Ins. Co.*, 1 Hall (N. Y.) 226; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 23 S. E. Rep. 463; 51 Am. St. Rep. 102; 30 L. R. A. 835.

⁶⁹ *Renshaw v. Missouri, etc., Ins. Co.*, 103 Mo. 595; 15 S. W. Rep. 945; 23 Am. St. Rep. 904; *Columbia, etc., Co. v. American Fire Ins.*

Co., 59 Mo. App. 204; *Ackley v. Phoenix Ins. Co.*, 25 Mont. 272; 64 Pa. Rep. 665.

⁷⁰ *Moore v. Protection Ins. Co.*, 29 Me. 97; 48 Am. Dec. 514; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492.

⁷¹ *Leggett v. Aetna Ins. Co.*, 10 Rich. L. 202.

⁷² *Hynds v. Schenectady, etc., Ins. Co.*, 16 Barb. 119, affirmed 11 N. Y. 554.

hazardous or extra hazardous, or included in the special rates, that the policy, while the premises were so used, should be of no effect," and in the conditions oil and turpentine were denominated hazardous, and spirits of turpentine extra hazardous, and houses, buildings or repairing were included within the memorandum of special rates of premiums; it was held that the fact, when the house was burnt, that painters were employed in repairing the house, for painting the inside, and for that purpose these oils were kept in the house, while the work was going on, such a quantity of paints, oil and turpentine did not avoid the policy.⁷³ A mere privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in reality abandoned, will not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy.⁷⁴ Keeping articles to be exhibited or to be used as means and instruments of the exhibition is not a use of the building "for the purpose of storing or keeping therein" such articles within a clause of the policy relating to hazardous articles.⁷⁵ In a Massachusetts case it was said that "the word 'kept,' as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period."⁷⁶ A provision in a policy prohibiting the keeping of any article considered hazardous was modified by endorsement upon as follows: "Permission given to keep one barrel of benzine or turpentine in tin cans . . . for use on the premises." One barrel of benzine was brought into the building, and exploded while being emptied into a large tin can, causing the building to be destroyed by the fire the explosion started. It was held that the temporary bringing in of the barrel of benzine was not a "keeping of benzine" in violation of the

⁷³ O'Neil v. Buffalo Fire Ins. Co., 3 N. Y. 122.

⁷⁴ Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113; 6 Sup. Ct. Rep. 306.

⁷⁵ City of New York v. Hamilton Fire Ins. Co., 10 Bosw. 537.

⁷⁶ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass.

475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587, citing Williams v. Ins. Co., 31 Me. 219; O'Neil v. Insurance Co., 3 N. Y. 122; Williams v. Insurance Co., 54 N. Y. 569; 13 Am. Rep. 620; Mears v. Insurance Co., 92 Pa. St. 15; Putnam v. Insurance Co., 18 Blatchf. 368; 4 Fed. Rep. 753.

terms of the policy.⁷⁷ It may be laid down as a general proposition that the usual clauses in fire insurance policies prohibiting the storing or keeping of certain hazardous articles have reference to a storing or keeping in a mercantile sense in considerable quantities, with a view to sales or traffic, or when storing or keeping is the principal object of the deposit, and not where the keeping is incidental and only for the purpose of consumption.⁷⁸ To merely carry gasoline through a store to deliver it at once, is not keeping it on the premises.⁷⁹ To keep it on the same lot but in a separate building is not keeping it on the premises.⁸⁰

§708. Store.

Litigation over what is prohibited in policies placed on a "country store" has been sharp and severe. These risks are considered rather hazardous. A policy placed on such a store is not avoided by the keeping of gunpowder and coal oil under a provision prohibiting the keeping of such articles, where it is shown that such articles are usually kept in such a store.⁸¹ A policy insured a building occupied as a store and the merchandise permitted to be kept in it, was such as was "usually kept in a country store," except as was otherwise provided in the policy. The clause "usually kept in a country store" was written in ink. In the policy was a printed clause to the effect that unless otherwise provided by agreement indorsed on it, it should be void if (any usage of trade to the contrary) gasoline was kept on the premises. The court held that if gasoline was an article usually kept in a country store, during the day time, for sale, the keeping of it on the premises for that purpose did not avoid the policy.⁸² A policy placed on a stock of goods

⁷⁷ *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219. S. W. Rep. 598. See *Rau v. Winchester Fire Ins. Co.*, 36 N. Y. App. Div. 179; 55 N. Y. Supp. 459.

⁷⁸ *Williams v. Fire Ins. Co.*, 54 N. Y. 569; 13 Am. Rep. 620.

⁷⁹ *London, etc., Ins. Co. v. Fischer*, 92 Fed. Rep. 500.

⁸⁰ *Fireman's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 343; 50

⁸¹ *American Fire Ins. Co. v. Nugent*, 7 Ky. Law Rep. 597; *Leggett v. Aetna Ins. Co.*, 10 Rich. Law 202.

⁸² *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503; 44 Pac. Rep. 189; 34

in a country store contained a printed stipulation, that benzine should not be kept without the consent of the insurer, but a written clause provided that the policy covered such goods "as is usually kept for sale in country stores." It was held that proof was admissible to show that the prohibited goods came within the written clause.⁸³ A clause in a policy rendering it void if gasoline be kept on the premises was held to apply to where it was brought to the store to be used in a gasoline stove in an upstairs room, having no connection with the store, but reached by an outside stairway.⁸⁴

§709. Grocery.

If a policy placed on a stock of groceries kept for retail prohibit the use of the building insured for the purpose of storing goods denominated hazardous or extra hazardous, the keeping of oil for the purpose of retail, in quantities not unusually large, is not a storing of oil within the prohibitory clause of the policy.⁸⁵ A policy provided that it should be void if the premises were used for storing or keeping on the premises any article mentioned in the classes of hazards annexed to it, "except as herein specially provided for, or hereafter agreed to by the insurer in writing upon this policy." The court found, the goods having been insured as "groceries," that the term "groceries" included a certain amount of such hazardous articles, and held that they were so especially provided for in writing on the policy.⁸⁶ A policy on a stock of merchandise prohibited the keeping of petroleum on the premises. The insured kept a barrel of petroleum on the premises for sale; and the insurer

L. R. A. 857; *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26; *Mechanics', etc., Ins. Co. v. Floyd*, 20 Ky. L. Rep. 1538; 49 S. W. Rep. 543.

⁸³ *Tubb v. Liverpool, etc., Ins. Co.*, 106 Ala. 651; 17 So. Rep. 615.

⁸⁴ *Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455; 83 N. W. Rep. 124.

⁸⁵ *Langdon v. New York, etc., Ins. Co.*, 1 Hall (N. Y.) 226; *Renshaw v. Missouri State, etc., Ins. Co.*, 103 Mo. 595; 15 S. W. Rep. 945; 23 Am. St. Rep. 904; *New York, etc., Ins. Co. v. Langdon*, 6 Wend. 623; *London, etc., Ins. Co. v. Fischer* 92 Fed. Rep. 500.

⁸⁶ *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124.

ance company insisted that this avoided the policy. The court instructed the jury that "merchandise" included whatever it was customary to keep in such a store, and, if a supply of petroleum, such as was kept on the premises, was a part of the usual stock of the store, the insured could recover. This was held error, for the reason that by the express contract petroleum was to be excluded.⁸⁷ Where, after a policy was issued on a dwelling house, a grocery was established in it, in which articles were sold that were denominated "hazardous" in the memorandum attached to the policy, it was held, on a loss by fire, that the insured was not entitled to recover.⁸⁸

§710. Watchmaker.

Where a policy is issued on "watchmaker's materials," it may be shown by parol evidence that the words include small amounts of benzine and kerosene, although the policy contains a printed stipulation preventing the keeping and use of inflammable substances.⁸⁹ The same is true of a manufacturer of brass clock works.⁹⁰

§711. Furniture store.—Wagonshop.

The keeping of benzine for necessary use in a repair shop connected with a retail furniture store will not avoid a policy covering the store and shop and the "furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," although benzine is expressly prohibited in the printed conditions of the policy.⁹¹ So where a paintshop

⁸⁷ *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147. To same effect *Whit-march v. Charter Oak Fire Ins. Co.*, 2 Allen 581; *Cerf. v. Home Ins. Co.*, 44 Cal. 320; 13 Am. St. Rep. 165.

⁸⁸ *Davern v. Merchants', etc., Co.*, 7 La. Ann. 344.

⁸⁹ *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835; 51 Am. St. Rep. 102.

⁹⁰ *Bryant v. Poughkeepsie, etc., Ins. Co.*, 17 N. Y. 200, affirming 21 Barb. 154.

⁹¹ *Faust v. American, etc., Ins. Co.*, 91 Wis. 158; 64 N. W. Rep. 883; 30 L. R. A. 783.

A policy on a furniture store covers paints and varnish used to finish the furniture, if usually kept by dealers. *Haley v. Dorchester, etc., Ins. Co.*, 12 Gray 545.

was kept over a wagonshop, both owned by the insured and operated together; and half a barrel of benzine was kept in the shop, it was held that the printed condition prohibiting the keeping of benzine was repugnant to the written clause insuring them.⁹²

§712. Factory.

The use of gasoline in a factory, in the business of the factory owner, such use being necessary, where only enough is kept as will be sufficient for a short time — as for a day — will not avoid a policy prohibiting the use of gasoline in such factory. Such was held to be the case where the policy was issued to a silver plating company on its tools and machinery in the factory.⁹³ In the case of a rope factory, where the policy provided that no oil should be used on the premises, the use of fish oil, which was necessary for the manufacture of a particular kind of rope manufactured in the factory, was held not to avoid the policy.⁹⁴ A manufacturer of brass clock works may keep all articles necessary to and usually employed in that manufacture, although keeping such articles is set forth in the printed terms of the policy as extra hazardous.⁹⁵ And this is true of any factory under a like policy.⁹⁶

§713. Drug Store.

A policy issued on a drug store insuring "articles usually kept for retail drug stores" covers gasoline, benzine, and ether. The keeping of such articles in reasonable quantities on the insured premises will not avoid the policy, though a printed con-

⁹² *Archer v. Merchants', etc., Co.*, 43 Mo. 434.

⁹³ *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151; 32 Atl. Rep. 613; 37 W. N. C. 39; *Mears v. Humboldt Fire Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647.

⁹⁴ *Baumgardner v. Ins. Co.*, 1 W. N. C. 119.

⁹⁵ *Bryant v. Poughkeepsie, etc., Ins. Co.*, 17 N. Y. 200, affirming 21 Barb. 154; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835.

⁹⁶ *Viele v. Germania Ins. Co.*, 26 Iowa 9; 96 Am. Dec. 83.

dition in it declares that unless otherwise provided by agreement endorsed on or added to it, the policy shall be void if there be kept benzine, ether, or gasoline, notwithstanding any custom or usage of trade may permit them to be kept.⁹⁷ Where a wholesale and retail drug store was kept in the same building separated only by a thin partition, and a policy was issued "on their wholesale stock of drugs, paints, oils, dyestuffs, and other goods on hand for sale, not more hazardous, while contained in the building," it was held that the word "wholesale" was supplemented, and its meaning extended to "other goods on hand for sale," not simply of the wholesale stock, but all other goods "contained in the building."⁹⁸

§714. Laundry.

The operation of a laundry is not a trade or manufacture within a clause in a policy forbidding the use of gasoline, notwithstanding any custom of trade or manufacture, so as to preclude proof of a custom of the use of gasoline by the residents of the community at the time the policy was issued, to explain or avoid such prohibitory clause.⁹⁹

§715. Patent Leather Factory.

A policy placed on a patent leather factory allowed benzole to be kept in a shop detached from the building, and, as needed, carried into the factory. Evidence was admitted of the custom in other cities as to the way in which benzole was ordinarily carried into the factory, there being no evidence of a different custom employed at the place where the factory was located.¹⁰⁰

⁹⁷ *Ackley v. Phoenix Ins. Co.*, 25 Mont. 272; 64 Pac. Rep. 665; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789.

⁹⁸ *Wilson Drug Co. v. Phoenix,*

etc., Co., 110 N. C. 350; 14 S. E. Rep. 790.

⁹⁹ *Northern, etc., Co. v. Crawford*, 24 Tex. Civ. App. 574; 59 S. W. Rep. 916.

¹⁰⁰ *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485.

§716. Painter.—Paintshop or factory.

A policy issued to a painter, keeping nothing except his productions, or his paints, oils, brushes, and other "merchandise," covers articles of necessity and convenience, though they are not kept for sale.¹⁰¹ A written rider attached to a policy provided that the insurance was against loss on "paints, oils, varnishes," etc., "and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop." A printed clause in the body of the policy provided that "this entire policy, unless otherwise provided by agreement thereon, or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above described premises, benzine," etc. It appeared in evidence that benzine was usually kept in . . . a shop such as the one insured. It was held that the prohibition with respect to benzine applied only when the article was not insured, and by insuring the benzine it was "otherwise provided, by agreement indorsed on the policy" that benzine might be kept on the premises.¹⁰² If the written part of a policy on a paint factory provides that it may be used for "hazardous or extra hazardous" purposes, it will control the printed part prohibiting the keeping of benzine; and the premises may be used as a paint factory in which benzine is used to manufacture paints.¹⁰³

§717. Torch to remove paint from house.

A policy provided that naphtha should not be used on the premises. The owner of the house employed a painter to paint the house, and he, with the consent of the owner, used a naphtha torch to remove the paint on the house preparatory to repainting it. The building caught fire from the torch and was consumed. Another provision in the policy provided that the circumstances

¹⁰¹ *Hartwell v. California Fire* *Mascott v. First, etc., Ins. Co.*, 69
Ins. Co., 84 Me. 524; 24 Atl. Rep. Vt. 116; 37 Atl. Rep. 255.
 954.

¹⁰² *Mascott v. Granite, etc., Ins.* *Ins. Co.*, 50 Minn. 409; 52 N. W.
Co., 68 Vt. 253; 35 Atl. Rep. 75; Rep. 906.

¹⁰³ *Russell v. Manufacturers', etc.,*

affecting the risk should not be so altered as to cause an increase of such risk. It was held that there was an alteration of "the situation or circumstances affecting the risk" within the meaning of the condition above stated; that the risk had been increased; that although no naphtha was used in the house, it was used "on the premises" within the meaning of the prohibitory clause; that the only question for the jury was whether the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a proper and reasonable manner, since such a provision in a policy is not intended to prevent the making of such repairs by proper means; that a finding of the jury that the method used was "the method ordinarily pursued to remove paint on the outside of a building preparatory to scraping it off, to paint it," is not equivalent to an affirmative finding on such question, for it assumes that the removal of the old paint was reasonably necessary, and that the particular building, as to the danger arising from moving the flaming torch all over its external surface, was like ordinary buildings; that the insurance company could show by an expert that the rates on a building where paint is to be removed from the outside by the use of a torch would have been higher than if there was to be no such use; that an expert may not testify as to the actual effect of the use of naphtha in reference to danger from fire, and that it was proper to admit the testimony of an expert as to the proper and usual way of removing paint from a building.¹⁰⁴ But where a policy provided that it should be void if gasoline be "kept, used, or allowed" on the premises, it was held that keeping it in the building to be used in filling gasoline torches for use in removing paint from the building, in order to repaint it, did not avoid the policy.¹⁰⁵

¹⁰⁴ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587.

¹⁰⁵ Smith v. German Ins. Co., 107 Mich. 270; 65 N. W. Rep. 236; 30 L. R. A. 368.

§718. Cleaning clothes.— Destroying vermin.

A policy on a dwelling house prohibiting the use of gasoline does not prohibit the use of gasoline in small quantities by members of the insured's family for the purpose of cleaning their clothes,¹⁰⁶ or destroying vermin.¹⁰⁷

§719. Cleaning or lubricating machinery.

Temporarily keeping on the premises small quantities of benzine to use in cleaning machinery and needful light will not avoid a policy prohibiting the keeping on the premises benzine.¹⁰⁸ Where oil was in constant use in the shop to lubricate the machinery, according to the common usage, and the insurer knew that practice, it was held that the insurer must have contracted with reference to the practice, and that it was bound even though oil thereafter was used for that purpose and the policy expressly prohibited the keeping or using of oil on the premises.¹⁰⁹

§720. Waiver by knowledge or acquiescence in use of building.

The knowledge of the company of the use the building was being put to at the time the policy is placed upon it may amount to a waiver of the prohibitory clause inserted in the policy; for in such an instance the insurance company cannot successfully contend that the policy was avoided by the use of the building in the manner prohibited in the policy. To do so would be to practically deny, often, that the policy was ever in force. Thus a policy placed on a factory prohibited the use of petroleum. At the time it was written the agent of the company knew that the factory was to be run at night and lighted by "headlight oil," a product of petroleum; and it was held that the condition should be deemed to have been waived

¹⁰⁶ *Columbia, etc., Co. v. American Fire Ins. Co.*, 59 Mo. App. 204.

¹⁰⁷ *La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518.

¹⁰⁸ *Mears v. Humboldt Ins. Co.*,

92 Pa. St. 15; 37 Am. Rep. 647.

See *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122.

¹⁰⁹ *Carlin v. Western, etc., Co.*, 57 Md. 515; 40 Am. Rep. 440.

by the company.¹¹⁰ If the agent knows that the prohibited article is kept and is to be kept on the premises, the policy will not be avoided.¹¹¹ A policy prohibited the keeping of gunpowder in the building insured, without a written permission, and it also contained a clause that nothing less than a distinct agreement, endorsed on the policy, should be construed a waiver of any condition or restriction. At the time of the loss the assured had a few pounds of gunpowder, which was kept in the insured building with the knowledge and express consent of the insuring company's local agent. A policy had been issued by the same company on the same building, and the same agent who knew gunpowder was kept in the building, and that all premiums had been paid to and accepted by the company, expressly permitted the keeping of the powder without calling the assured's attention to the prohibitory clause. It was held that the failure of the assured to have the written consent of the company indorsed, on the policy, under the circumstances, did not render it void, for the condition had been waived.¹¹² Where an insurance company issued a policy on a woollen mill and its contents, knowing at the time that naphtha was used and was necessarily used in the business, it waived a printed condition of the policy that it should be void if the assured uses naphtha; and after a loss the company was held estopped from setting up the use of naphtha to defeat a recovery on the policy.¹¹³ If the application shows the nature of the business carried on in the building insured, and it is such a building as indicates the character and the nature of the article to be kept in the building, so that the nature and extent of the risk must have been

¹¹⁰ *Couch v. Rochester, etc., Ins. Co.*, 25 Hun 460; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Farmers', etc. Ins. Co. v. Nixon*, 2 Colo. App. 265; 30 Pac. Rep. 42; *Kruger v. Western, etc., Ins. Co.*, 72 Cal. 91; 13 Pac. Rep. 156.

¹¹¹ *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202; *Kenton Ins. Co. v. Downs*, 90 Ky. 236; 13 S. W. Rep. 882; 12 Ky. L. Rep. 115. *Contra*,

Western, etc., Co. v. Rector, 85 Ky. 294; 3 S. W. Rep. 415; 9 Ky. L. Rep. 3; *Bartholomew v. Merchants' Ins. Co.*, 25 Ia. 507; 96 Am. Dec. 65; *American Fire Ins. Co. v. Nugent*, 7 Ky. Law Rep. 597.

¹¹² *Reaper City Ins. Co. v. Jones*, 62 Ill. 458.

¹¹³ *Wheeler v. Traders' Ins. Co. (N. H.)*, 1 Atl. Rep. 293.

known to the insurers to embrace articles and pursuits specified as extra hazardous, the carrying on of a business in the building designated as extra hazardous will not avoid the policy.¹¹⁴ A policy issued by a foreign insurance company prohibited the storing in the building insured petroleum in excess of five gallons without permission first endorsed on the policy. After the policy was issued, the company's local agent gave the insured verbal permission to keep on the premises more than five gallons. A loss occurred under the policy, but not from the keeping of the petroleum. In a suit on it there was evidence of a mutual mistake of the insured and the agent as to the prohibitory clause in the policy; and it was held that it was proper to submit the case to the jury on the ground of estoppel caused by such mistake, as the agent alone could act in the State where the policy was issued.¹¹⁵

§721. Waiver by knowledge of acquiescence in use of building continued.

Notwithstanding the cases cited in the previous section, it cannot be said that knowledge of the use the building is put to, at the time the policy is issued, will always prevent its forfeiture; nor can it be said that the cases are harmonious on the question. Thus where a policy was issued on a country store in which gunpowder was at the time habitually kept and intended to be kept, to the insurance agent's knowledge, who also represented that the provisions of the policy did not prevent the insured keeping it, it was held that the policy was avoided because of a clause in it prohibiting the keeping of gunpowder and avoiding it if powder was kept in the building covered by the policy.¹¹⁶ Where a policy on a stock of hardware and stoves provided that no gasoline should be used or kept on the prem-

¹¹⁴ *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. 231. Ky. L. Rep. 3. *Contra*, *Peoria, etc., Ins. Co. v. Downs*, 90 Ky. 236; 13

¹¹⁵ *Queen's Ins. Co. v. Harris* (Pa.), 2 Wkly. N. C. 220. S. W. Rep. 882; 12 Ky. L. Rep. 115; *Birmingham Fire Ins. Co. v.*

¹¹⁶ *Western, etc., Co. v. Rector*, 85 Ky. 294; 3 S. W. Rep. 415; 9 Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147.

ises, and avoided it if it were so kept, and also provided that no representative of the company could waive the use of its provisions, except in certain cases by indorsement on the policy, it was held avoided by the use of small quantities of gasoline from time to time to illustrate the operation of gasoline stoves offered for sale, although the local agent taking the application and also the local board of underwriters, of which the insurance company or its agents were members, knew of the practice of the assured.¹¹⁷ The consent of a local agent, whose authority is limited to soliciting insurance, delivering policies, and receiving premiums, to change the use of a building and use it for a restaurant, which included the use of a gasoline stove, will not amount to a waiver of the terms of the prohibitory clause.¹¹⁸ The fact that the company knew there were no gas fixtures in the house insured, and that the occupant immediately preceding the issuance of the policy used a spirit lamp for lighting such house, was held not to constitute a waiver of the clause in the policy forbidding the use of spirit gas.¹¹⁹ Where the insured had kept fireworks in another store, knowledge of the insurance agent of this fact at the time the policy was issued, was held to be no waiver of a clause in the policy prohibiting the keeping of them in the building insured.¹²⁰ If there is nothing in the application or description of the property which necessarily implies or indicates the use to which it is or will be put, the insurance company will not waive a condition in a policy prohibiting the use of gasoline, nor consent to an existing use which could have been ascertained by reasonable investigation.¹²¹ The fact that the rate charged was the same as that charged for an adjoining building, which included a charge for the use of gasoline, will not estop the insurance company from claiming

¹¹⁷ *Fischer v. London, etc., Ins. Co.*, 83 Fed. Rep. 807; affirmed, 92 Fed. Rep. 500; *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147.

¹¹⁸ *Garretson v. Merchants', etc., Co.*, 81 Iowa 727; 45 N. W. Rep. 1047.

¹¹⁹ *Minzesheimer v. Continental Ins. Co.*, 5 Jones and S. (N. Y.) 332.

¹²⁰ *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

¹²¹ *McFarland v. St. Paul, etc., Ins. Co.*, 46 Minn. 519; 49 N. W. Rep. 253.

a forfeiture for a breach of the condition against the use of gasoline, on the ground that it had constructive notice of such use, the insured not having informed it of the use of the gasoline.¹²² A broker procuring insurance for the insured is not the company's agent; and his failure to inform the insured that the use of gasoline will avoid the policy will not estop the company; ¹²³ nor will his knowledge of the use of forbidden articles on the insured premises be a waiver of the forfeiture.¹²⁴

§722. Waiver by receiving premium with knowledge of prohibited user.

If a building be used for purposes prohibited by the policy, and, with full knowledge of that fact, the insurer makes and collects assessments on a premium note given for the insurance, he will thereby waive the forfeiture.¹²⁵ This is especially true if the agents of the company, at the time the policy was issued, told the insured that an article prohibited by the terms of the policy might be used; ¹²⁶ or the company, being informed of the prohibited use, declines to fix an increase rate of premiums, and treats the contract as subsisting.¹²⁷ And it has been apparently held that a failure to cancel a policy, under a clause allowing the insurer to do so, after he has notice of the prohibited use, will amount to a waiver of the right to defend because of such use.¹²⁸

§723. Waiver by adjusting loss or accepting proof without objection.

If there has been a forfeiture by the use or keeping of a prohibited article on the premises, but the adjusting agent objects

¹²² *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312; 34 Atl. Rep. 875.

¹²³ *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312; 34 Atl. Rep. 875.

¹²⁴ *Kings County Ins. Co. v. Swigert*, 11 Ill. App. 590.

¹²⁵ *Keenan v. Dubuque, etc., Ins. Co.*, 13 Iowa 375.

¹²⁶ *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687.

¹²⁷ *Witte v. Western, etc., Ins. Co.*, 1 Mo. App. 188.

¹²⁸ *Farmers', etc., Ins. Co. v. Nixon*, 2 Colo. App. 265; 30 Pac. Rep. 42.

to the proofs received solely upon the ground that they are not made out in the form used by the company, and the proofs are then made out on blanks furnished by him, the company will waive its right to insist upon a forfeiture.¹²⁹ So if the company require proof at the expense of the insured, without claiming a forfeiture, there will be a waiver.¹³⁰ But where the policy had ceased to have any effect by reason of the fact that the insured had kept prohibited articles, it was held that a promise made by an agent, having authority to adjust and pay losses, with knowledge that the prohibited articles had been kept in the house at the time of the fire, was not a waiver that bound the company.¹³¹

§724. Insurance company's right of action to recover damages.

Effect of insurance on right of action.

If a company has insured the property destroyed by the negligence of a gas company, and it has paid the loss and become subrogated to the rights of the owner, it may maintain an action to recover damages to the extent of the loss, or at least the amount of the loss, it has paid, where the amount paid is less than the loss sustained.¹³² The fact that the property destroyed is fully insured and the loss has been paid, does not prevent the owner recovering damages from the gas company.¹³³ From a reported case it would seem that subrogation is allowed where an insurance company pays the loss, even though the policy contain no clause of subrogation.¹³⁴

¹²⁹ *Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446.

¹³⁰ *Garrettson v. Merchants', etc., Ins. Co.*, 81 Iowa 727; 45 N. W. Rep. 1047.

¹³¹ *Phoenix Ins. Co. v. Lawrence* 4 Metc. (Ky.) 9; 81 Am. Dec. 521.

¹³² *Indiana, etc., Gas Co. v. New Hampshire, etc., Co.*, 23 Ind. App. 298; 53 N. E. Rep. 485.

¹³³ *Armbruster v. Auburn Gas-*

light Co., 18 N. Y. App. 447; 46 N. Y. Supp. 158; *Lindsay v. Bridge Water Gas Co.*, 24 Pittsb. L. J. (N. S.) 276; 14 Pa. Co. Ct. Rep. 181.

¹³⁴ *German-American Ins. Co. v. Standard Gaslight Co.*, 34 N. Y. Misc. Rep. 594; 70 N. Y. Supp. 384; 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973. See *Commercial Union Fire Ins. Co. v. Lister*, 23 Gas J. 364.

§725. Gas company causing fire liable to insurance company.

A gas or oil company negligently causing a loss by fire is liable to an insurance company that was liable to pay the owner for the loss. The right of action is based upon the liability of the company to the owner of the property destroyed.¹³⁵ The insurance company is subrogated, upon payment of the loss, to all the rights of the insured.¹³⁶ If the insured has released the gas or oil company before payment is made by the insurance company, then the latter cannot recover from the gas or oil company causing the damages.¹³⁷ If the insured release the wrong-doer from all liability, he thereby releases the insurance company; and if the release is in part, he releases the insurance company to that extent.¹³⁸ If the loss is payable to a mortgagee of the property destroyed; and the policy provides that by no act of the owner of the property shall the policy be forfeited, then upon payment of the amount due under the policy, not to exceed the amount due on the mortgage, the insurance company may foreclose the mortgage against the property, if the policy as to such owner was avoided by his act.¹³⁹

¹³⁵ Insurance Co. of N. A. v. Fidelity, etc., Co., 125 Pa. St. 523; 16 Atl. Rep. 791; 2 L. R. A. 586; Svea, etc., Co. v. Packham, 92 Md. 464; 48 Atl. Rep. 359; 52 L. R. A. 95.

¹³⁶ Insurance Co. of N. A. v. Fidelity, etc., Co., *supra*; Niagara Fire Ins. Co. v. Fidelity, etc., Co., 125 Pa. St. 516; 16 Atl. Rep. 791; Packham v. German Fire Ins. Co., 91 Md. 515; 46 Atl. Rep. 1066; 50 L. R. A. 828; Norwich Fire Ins. Society v. Standard Oil Co., 59 Fed. Rep. 984; 8 C. C. A. 433; 19 U. S. App. 460; Hall v. Nashville, etc., Ry. 13 Wall 367; Sims v. Mutual, etc., Ins. Co., 101 Wis. 586; 77 N. W. Rep. 908; Omaha Ry. Co. v.

Granite Ins. Co., 63 Neb. 514; 73 N. W. Rep. 950.

¹³⁷ Phoenix Ins. Co. v. Erie, etc., Co., 117 U. S. 312; 6 Sup. Ct. Rep. 750, 1176; Packham v. German Fire Ins. Co., *supra*.

¹³⁸ Packham v. German Fire Ins. Co., *supra*; Aetna Ins. Co. v. Humboldt, etc., Ry. Co., 3 Dill 2. *Contra*, People's Natural Gas Co. v. Fidelity, etc., Co., 150 Pa. St. 8; 24 Atl. Rep. 339; Insurance Co. of N. A. v. Fidelity, etc., Co., 123 Pa. St. 523; 16 Atl. Rep. 791; 2 L. R. A. 586.

¹³⁹ Badger v. Platts, 68 N. H. 222; 44 Atl. Rep. 296; Traders' Ins. Co. v. Race, 142 Ill. 338; 31 N. E. Rep. 392.

§726. Inhaling gas, accident or life insurance policy.

Clauses in accident or life insurance policies often provide that the company shall not be liable for injuries or deaths produced by inhaling gas. In such a case if the inhaling is done while asleep or unconscious, it is considered that such a clause is not violated, and a recovery is allowed.¹⁴⁰ In the case just cited the court declared that "in expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included, the dentist's work; or to a suicidal purpose."¹⁴¹ Where a provision of an accident policy was that the company "does not insure against the death or disability . . . arising from anything accidentally taken, administered, inhaled, contact of poisonous substances, inhaling gas, or any surgical operation," it was held that the company was not relieved from liability for a death caused by inhaling illuminating gas which accidentally escaped into an hotel room where the insured was sleeping. "That provision in the policy," said the court, "clearly implies voluntary action on the part of the insured, or some other person. The insured must take or inhale, or another must administer. The manifest provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. That is more apparent by that portion of the provision which relates

¹⁴⁰ Paul v. Travellers' Ins. Co., v. U. S., etc., Co., 123 N. Y. 304; 112 N. Y. 472; 20 N. E. Rep. 347; 25 N. E. Rep. 399; 9 L. R. A. 617; affirming 45 Hun 313.

¹⁴¹ Affirmed in principle in Bacon

to something 'administered,' as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered. All cases thus provided for plainly involve voluntary and conscious action on the part of the insured, or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured. That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly taken, administered, or inhaled, there can, we think, be but little doubt. As thus construed, this provision, manifestly, did not exempt the defendant from liability in this case, as it was admitted that the death of the insured was occasioned by accidental means, and was caused by involuntary and accidentally breathing illuminating gas which had escaped into the room where he was sleeping at the time of his death. The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specifically provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes. The general provision applies when it is inhaled for other purposes."¹⁴²

¹⁴² *Menneilley v. Employers', etc.*, Corp., 148 N. Y. 596; 43 N. E. Rep. 54; 31 L. R. A. 686; affirming 25 N. Y. Supp. 230; *Fidelity, etc., Co. v. Waterman*, 161 Ill. 632; 44 N. E. Rep. 283; 32 L. R. A. 654, affirming 59 Ill. App. 297; *Pickett v. Pacific, etc., Ins. Co.*, 144 Pa. St. 79; 22 Atl. Rep. 871; *Travellers' Ins. Co. v. Dunlap*, 160 Ill. 642; 43 N. E. Rep. 765, affirming 59 Ill. App. 515 (unknowingly taking pois-

Death caused by inhaling gas in the atmosphere is regarded as death produced by a violent external agency within the meaning of a provision of a policy requiring the death to be caused by external and violent means.¹⁴³ And where the insurance company admitted that the death was caused by involuntary and accidental breathing of illuminating gas which had accidentally escaped into the deceased's room; that there were no visible marks of the accident upon the body, but when artificial respiration was produced, illuminating gas emanated therefrom to the perception of the persons producing such respiration; and that on entering the room it was perceived to be full of gas, and gas was still escaping, and that an inspection of the body showed life to be extinct, this was held to authorize a recovery on the policy.¹⁴⁴

on); *Healey v. Mutual, etc., Co.*, 133 Ill. 556; 25 N. E. Rep. 52 (unknowingly taking poison); *Metropolitan, etc., Assn. v. Froiland*, 161 Ill. 30; 43 N. E. Rep. 766, affirming 59 Ill. App. 522; *Picket v. Pacific, etc., Ins. Co.*, 144 Pa. St. 79; 22 Atl. Rep. 871; *Omberg v. U. S., etc., Association*, 111 Ky. 303; 40 S. W. Rep. 909; *Lowenstein v. Fidelity and Casualty Co.*, 88 Fed. Rep. 474; affirmed 97 Fed. Rep. 17;

Healey v. Mutual, etc., Co., 133 Ill. 556; 25 N. E. Rep. 52. *Contra*, *Richardson v. Ins. Co.*, 46 Fed. Rep. 843; and see *Kasten v. Interstate, etc., Co.*, 99 Wis. 73; 74 N. W. Rep. 534; 40 L. R. A. 651.

¹⁴³ *Paul v. Travellers' Ins. Co.*, *supra*; *United States, etc., Co. v. Newman*, 84 Va. 52; 3 S. E. Rep. 805.

¹⁴⁴ *Menneilley v. Employers', etc., Corp.*, *supra*.

CHAPTER XXXII.

TAXATION.

- §727. Scope of chapter.
- §728. When corporate stock taxed, property of company exempt.
- §729. Exempt as a manufacturing company.
- §730. Gas mains of city plant taxed as personal property.
- §731. Assessing franchise.
- §732. Valuation of stock.—Certificates as to surplus.
- §733. Exemption of municipalities from taxation.
- §734. Rates charged consumers not taxes.
- §735. Cost of inspection of meters.
- §736. Object of tax.—Ohio Statute unconstitutional.
- §737. United States revenue.
- §738. Set off.
- §739. Product in pipeline. Inter-state commerce.
- §740. Exemption from taxation.
- §741. Taxes on leases and minerals.

§727. Scope of chapter.

Necessarily this chapter must be limited to those cases in which the subject of taxes, or rating, as it is called in England, is peculiar to gas companies, gas and oil leases, or interests in land, gas fixtures, pipes and works, and oil or gas when held in pipes, tanks and reservoirs. It is manifest at a glance that the power to impose taxes and the liability for them must depend upon statutes in force at the place of taxation; and that a decision construing one statute can afford little light in construing another.

§728. When corporate stock taxed, property of company exempt.

The value of stock of a corporation is determined by the value of property it represents. To tax both the stock and the property would be double taxation, a thing that it cannot be

supposed the legislature intended. Where, therefore, the stock of a gas company is taxed, the property it represents is not taxable, and usually the property is such property as is necessary to enable the corporation to execute the object and fulfill the purposes for which it was chartered.¹ Dwelling houses, however, that were not necessary for the performance of a company's proper work and which had been built for the accommodation of its workingmen, has been held liable to taxation.²

§729. Exempt as a manufacturing company.

Under a statute³ exempting from taxation "manufacturing companies carrying on manufactures within" the State, an artificial gas company organized, even before the statute was enacted, is exempt from taxation; and so is a foreign gas corporation doing business within the State.⁴

§730. Gas mains of city plant taxed as personal property.

The general rule is that gas mains of a city plant, laid in the public streets do not become part of the real estate but are personal property, and taxable as such. They are personal property and belong to the gas company, and are a part of the usual and necessary appliances of such an establishment, without which the gas manufactured could not be received or delivered to the consumer.⁵ On the contrary it has been held that reservoirs, hydrants and pipes of a water company are real and not personal property, and are taxable in the town in which they are situated.⁶ In Iowa the entire plant is

¹ Coatsville Gas Co. v. County of Chester, 97 Pa. St. 476.

² West Chester Gas Co. v. County of Chester, 30 Pa. St. 232.

³ N. Y. Act. 1880, Chap. 542, Sec. 3.

⁴ Nassau, etc., Co. v. Brooklyn, 25 Hun 567.

⁵ Memphis Gaslight Co. v. State, 6 Coldw. 310; 98 Am. Dec. 452; People, *ex rel* Citizens', etc., Co. v.

Assessors of Brooklyn, 6 N. Y. Trans. App. 116; Commonwealth v. Lowell Gaslight Co., 12 Allen 75; Covington Gaslight Co. v. City of Covington, 84 Ky. 94; Shelbyville Water Co. v. People, 140 Ill. 545; 30 N. E. Rep. 678; 16 L. R. A. 505.

⁶ Dover v. Main Water Co., 90 Me. 180; 38 Atl. Rep. 101; Consumers' Gas Co. v. Toronto, 27 Can. S. C. 453; affirmed 23 Ont.

assessed as a whole, including the pipes, in the city or township where the main works are located.⁷ In England gas-pumpers, gas retorts, pumps and exhausters are taxed as fixtures, but meters are personal property.⁸ In England where the tax is levied on the income after allowing certain deductions, where the gas works were situated in one township and the pipes extended into four other townships, it was held "that the ratable value of the mains and pipes, which would be the residue, after deducting the net ratable value of the stations, works, buildings and lands within the township where situated from the value of the whole ratable property of the company, must be apportioned among the different townships, not simply according to the extent of the mains contained in each, but keeping in view also the fact that part of them contributed directly, and part only indirectly, to the profits."⁹ If the pipes are to be assessed

App. Rep. 551. (This Canadian decision is controlled by a Statute declaring that "land shall include" all machinery or other things so fixed to any outbuilding as to form in law part of the realty." *Consumers' Gas Co. v. Toronto*, 26 Ontario Rep. 722.) *Providence Gas Co. v. Thurber*, 2 R. I. 15; *Riverton, etc., Co. v. Haig*, 58 N. J. L. 295; 33 Atl. Rep. 215; *Paris v. Norway Water Co.*, 85 Me. 330; 27 Atl. Rep. 143 (taxable as real estate in the town where laid, although the company's works are situated in another town); *People v. Martin*, 48 Hun 193; *Tidewater Pipe Line Co. v. Berry*, 53 N. J. L. 212; 21 Atl. Rep. 490.

⁷ *Oskaloosa Water Co. v. Board*, 84 Iowa 407; 51 N. W. Rep. 18.

⁸ *Regina v. Lee*, L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S.) 704; 14 W. R. 311.

⁹ *Michael and Will on Gas and Water* (5 ed.), 53. See *Regina v. Mile End Old Town*, 10 Q. B. 208;

3 New Sess. Cas. 13; 16 L. J. M. C. 184; 11 Jur. 985; *Regina v. West Middlesex Waterworks Co.*, 1 E. and E. 716; 28 L. J. M. C. 135; 5 Jur. (N. S.) 1159; *Regina v. Sheffield Consolidated Gaslight Co.*, 32 L. J. M. C. 169; 4 B. and S. 135; 9 Jur. (N. S.) 623; 8 L. T. (N. S.) 692; 11 W. R. 1064; *Sculcoates Union v. Hull Dock Co.* [1985], App. Cas. 137; 64 L. J. M. C. 49; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612; 11 R. 74. See also *Riverton, etc., Co. v. Haig*, 58 N. J. L. 295; 23 Atl. Rep. 215, where the court refused to class the plant of a water company as a "farm" or "lot" so it could be assessed in one district. "The idea that they [the pipes] may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest." *Paris v. Norway Water Co.*, *supra*. *Contra*, *In re Des Moines Water Co.*, 48 Ia. 324; *Fall River v. Bristol Co.*, 125 Mass. 567; *Oskaloosa Water Co. v. Board*, 84 Ia. 407; 51 N.

as real estate, the sale of the real estate of the company, other than the pipes, to pay the tax upon them, is erroneous.¹⁰

§731. Assessing franchise.

In New York a foreign gas company selling and distributing gas to consumers, under authority from a municipality, natural gas furnished by another company, whose property consists of pipes and mains located beneath the surface of the street and reservoirs built on a lot, must be assessed on its property as real estate "at its full and true value";¹¹ and in determining the value of the franchise granted by the municipality, and the value of the contract with the company for supplying the city with gas, cannot be considered.¹²

§732. Valuation of stock.—Certificates as to surplus.

The value of the physical property of a gas company does not necessarily determine the value of its stock; nor does the amount the stockholders would receive upon a dissolution of the corporation. The privileges, rights, patents and franchise of the company must also be considered in determining the value of the stock.¹³ Certificates of a stockholder's interest in the surplus revenue of the company, reserving to the gas company the right to redeem them upon notice of their face value, or by the issue of ordinary stock, are not taxable, since such surplus is taxable to the company.¹⁴

W. Rep. 18; 15 L. R. A. 296; San Jose v. January, 57 Cal. 614; Fond Du Lac Water Co. v. Fond Du Lac, 82 Wis. 322; 52 N. W. Rep. 439; 16 L. R. A. 581; Yellow River, etc., Co. v. Wood County, 81 Wis. 554 51 N. W. Rep. 1004.

¹⁰ Capitol City Gaslight Co. v. Charter Oak Ins. Co., *supra*.

For a short discussion of gas and water pipes laid in a public street, see article by J. H. Beale in 4 Harvard Law Review 83.

¹¹ Laws 1881, Chap. 293.

¹² People v. Martin, 48 Hun 193. The New York laws of 1855, Chap. 37, assessing the property of a foreign corporation, has no application to such a case as is above stated, as that statute applies only to personalty. *Ibid*.

¹³ People *ex rel* Buffalo, etc., Co. v. Steele, 56 N. Y. 664; 1 Sheldon 345.

¹⁴ People *ex rel* Williamsburg Gas Co. v. Assessors of Brooklyn, 76 N. Y. 202; 16 Hun 196.

§733. Exemption of municipalities from taxation.

The property of a municipality used in furnishing natural gas to it and its citizens is exempt from taxation under a statute exempting the property of a municipality from taxes.¹⁵ But where the constitution of a State provided that "there shall be exempt from taxation public property used for public purposes," it was held that a city's water or gas plant may be taxed by the State, the same as it may tax any private corporation.¹⁶ A statute exempting from taxation property of a city used by it in furnishing its citizens with gas or water does not apply to an independent company furnishing such inhabitants with gas or water.¹⁷

§734. Rates charged consumers not taxes.

Rates or rents established by a municipal corporation to be charged for the use of water furnished by it are not taxes which may be collected by the tax collector, even though the water works are operated at a profit.

§735. Cost of inspection of meters.

A statute creating the office of a gas meter inspector, and providing that his salary shall be paid by assessment upon the various gas companies of the State, is valid, and does not violate a constitutional provision providing that all taxes shall be assessed upon property by a uniform rule. Such an assessment is not a tax for general revenue. It is a charge for a special

¹⁵ Toledo v. Hosler, 54 Ohio St. 418; 43 N. E. Rep. 583; 35 Ohio L. J. 215.

¹⁶ Neeley v. City of Henderson (Ky.), 55 S. W. Rep. 554. See Commonwealth v. McKibbin, 90 Ky. 384; 14 S. W. Rep. 372; Covington v. Commonwealth, 19 Ky. L. Rep. 105; 39 S. W. Rep. 836; 173 U. S. 231; Newport v. Commonwealth,

21 Ky. L. Rep. 42; 50 S. W. Rep. 845; 51 S. W. Rep. 343; 45 L. R. A. 518. See also Wagner v. Rock Island, 146 Ill. 139; 34 N. E. Rep. 545; 21 L. R. A. 519.

¹⁷ Austin v. Austin Gaslight Co., 69 Tex. 180; 7 S. W. Rep. 200; Newport Light Co. v. City of Newport, 14 Ky. L. Rep. 464; 20 S. W. Rep. 434.

purpose growing out of the supervisory power of the State over the gas companies' business.¹⁸

§736. Object of tax.—Ohio statute unconstitutional.

The constitution of Ohio contains a provision declaring that every statute imposing a tax shall state distinctly the object of such tax.¹⁹ A statute of that State provided that in counties of a certain population moneys arising from the tax on oil wells should be returned to the township treasurer, not to exceed a specified amount, for the exclusive purpose of repairing highways. This statute was held to violate the provision of the constitution referred to, for the reason that the tax on the oil wells was raised for another specific purpose.²⁰

§737. United States revenue.

An Internal Revenue Act of the United States²¹ levied a tax upon gas, but allowed the manufacturer of it to add the tax to the cost charged the consumer. The City of Pittsburg surrendered to a gas company certain shares of stock it held in the company, in consideration of which the company agreed to furnish it with gas "free from charge." Under this agreement a large amount of gas was furnished on which the gas company paid the tax, and then brought suit to recover the amount from the city. But they were defeated, the court holding that the city was not liable.²² This statute provided that the gas made by the manufacturer "for his own use" should not be taxable. While it was in force the Philadelphia gas works was held and operated by trustees, appointed by the city, under a trust agreement. While the city had apparently

¹⁸ *Cincinnati Gaslight Co. v. State*, 18 Ohio St. 237.

Under its general "welfare clause" a city cannot provide by ordinance that a water company shall be annually licensed and registered, and pay a certain sum to the city for police purposes. *Wilkes-*

Barre v. Crystal Spring Water Co., 7 Kulp. (Pa.) 31.

¹⁹ Ohio Const., Art. 12, Sec. 5.

²⁰ *State v. Fangboner*, 14 Ohio Cir. Ct. Rep. 104; 7 Ohio Dec. 334.

²¹ 13 U. S. Stat. at L. 264, Sec. 94.

²² *Gas Company v. Pittsburg*, 101 U. S. 219.

the ultimate ownership of the gas works under this agreement, until certain debts due from the city, contracted to build and enlarge the works, were paid, they were to be held and managed exclusively by these trustees, who were to sell gas to the city at a certain price, and set aside all clear profits to provide a sinking fund for the payment of the principal due the creditors. It was held that gas furnished the city under this agreement was "made" and sold within the meaning of the statute so as to render it liable to taxation.²³

§738. Set off.

A city, when sued for the amount it owes a gas company for gas furnished it, cannot set off, when a statute provides that a set off "can only be pleaded in an action founded on contract, or ascertained by the decision of the court," against such amount the delinquent taxes due it from such company; for the reason that taxes "neither arise upon contract, either expressed or implied, nor is the amount thereof determinable by the judgment of a court."²⁴

§739. Product in pipeline. Inter-state commerce.

A pipe line company transporting oil through its pipes from one State to another, may be taxed in the latter State for the privilege of doing business in that State; and the tax may be a certain percentage of the receipts from the transportation of the oil, such a tax not being an interference with inter-State commerce.²⁵

²³ *City of Philadelphia v. Collector*, 5 Wall 720. See *Glasgow Gas Comrs. v. Solicitor*, at 3 Court of Sessions Rep. (4 Series) 857.

²⁴ *Nebraska City v. Nebraska, etc., Co.*, 9 Neb. 339; 2 N. W. Rep. 870.

²⁵ *State v. State Board*, 57 N. J. L. 516; 31 Atl. App. 220; 27 L. R. A. 684. For analogous cases, see

Maine v. Grand Trunk Ry., 142 U. S. 217; 12 Sup. Ct. Rep. 121, 163; *G. C. T. Railroad Tax Cases*, 92 U. S. 575; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Cleveland, etc., Co. v. Backus*, 133 Ind. 513; 33 N. E. Rep. 421; 18 L. R. A. 729; affirmed 154 U. S. 439; 14 Sup. Ct. Rep. 1122.

§740. Exemption from taxation.

In Pennsylvania boilers, engines and derricks used for the transportation of oil and to aid in its production are exempt from taxation by statute.²⁶ And so of companies transporting natural gas to the public are exempt as to local taxes, being a public corporation.²⁷ Pipes of natural gas company laid in the streets are exempt in this State.²⁸ And the buildings of a gas company are also exempt from local taxation, if it pays taxes to the State.²⁹ In Ohio gas wells, pipe lines, pumping stations and machinery owned and used by a city for the conveyance of gas to be consumed by it and its citizens generally are exempt by statute³⁰ exempting all works, machinery, pipe lines and fixtures belonging to any town or city and used exclusively for testing and lighting such town or city.³¹ In California inasmuch as the franchise of a gas company is assessed as a whole,³² pipe lines running through a county to supply people of another county are not subject to local taxation, for the reason that such pipe line is not a franchise, being only a mere right of way.³³ Property not used for a public purpose, as a house for a tenant,

²⁶ *Mellon v. Alleghany Co.*, 3 Pa. Dist. Ct. Rep. 422.

²⁷ *St. Marys Gas Co. v. Elk Co.*, 191 Pa. St. 458; 43 Atl. Rep. 321; *Ridgeway Light, etc., Co. v. Elk Co.*, 191 Pa. St. 465; 43 Atl. Rep. 323; *Mellon v. Alleghany Co.*, 3 Pa. Dist. Rep. 422.

²⁸ *Pittsburgh's Appeal*, 123 Pa. St. 374; 16 Atl. Rep. 621; *Coots-ville Gas Co. v. West Chester Co.*, 97 Pa. St. 476.

²⁹ *Schuylkill Co. v. Citizens' Gas Co.*, 148 Pa. St. 162; 23 Atl. Rep. 1055; *West, etc., Co. v. Philadelphia*, 3 Pa. Dist. Rep. 52; *Spring Brook, etc., Co. v. Schadt. Co.*, 3 Lack L. News 170. (In this case it was held that the rule which measures the extent to which property used by a water company

for the purpose of furnishing proper water to the public shall be exempted from local taxation will be liberally construed in favor of the company.) *Brush Electric Light Co. v. Philadelphia*, 8 Pa. Dist. Rep. 231.

The same rule prevails in New York as to taxing locally the value of the franchise. *People v. Brooklyn Assessors*, 19 N. Y. App. Div. 599; 46 N. Y. Supp. 388.

³⁰ Rev. Stat., Sec. 2732.

³¹ *Toledo v. Hosler*, 54 Ohio St. 418; 35 Ohio L. J. 215; 43 N. E. Rep. 583.

³² *San Jose v. January*, 57 Cal. 614.

³³ *Spring Valley Waterworks Co. v. Barber*, 99 Cal. 36; 33 Pac. Rep. 735; 21 L. R. A. 416.

is not exempt from taxation in Pennsylvania; ³⁴ even houses of the workmen of the company owned by it are not exempt. ³⁵

§741. Taxes on leases and minerals.

If there is no covenant on the part of the lessee to pay the taxes on the landowner's interest in the premises, he is not bound to do so, ³⁶ unless same statute especially fixes that burden upon him. ³⁷ The lessor pays the value of his own interest in the land; and the lessee the value of his interest in them under the lease, which includes the improvements he has put upon the land premises in the operation of them under the lease. ³⁸ In no event can the land be assessed higher by reason of the two interests being owned by two persons than if they were owned by one of them. ³⁹ When the entire premises is owned by one person the value of the mineral underneath the surface cannot be assessed separate and apart from the landowner's remaining interest in the land. ⁴⁰ But the lease may provide that the lessee shall pay all the taxes assessed against the entire premises. Thus where a lease of coal land which created a divided ownership of the coal and surface provided that the lessor should pay all taxes on the leased land, it was held that the lessee was liable for the taxes assessed upon the lands while in possession and exploring them, though no ore was found and the lease was subsequently declared forfeited. ⁴¹ A covenant by the lessee to pay taxes does not cover a local municipal assess-

³⁴ *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. St. 162; 23 Atl. Rep. 1055.

³⁵ *West Chester Gas Co. v. Chester Co.*, 30 Pa. St. 232; *Ridgeway Light and Heat Co. v. Elk Co.*, *supra*.

³⁶ *Sanderson v. City of Scranton*, 105 Pa. St. 469; *Delaware, etc., Co. v. Sanderson*, 109 Pa. St. 583.

³⁷ *Chevington & Bum Co. v. Lewis*, 10 W. N. C. (Pa.) 196.

³⁸ *Hecksher v. Sheaffer*, 17 W. N. C. (Pa.) 323; *Hale, etc., Co. v.*

Storey County, 1 Nev. 105; *Flory v. Heller*, 1 Monaghan (Pa.) 478; *Miles v. Delaware, etc., Co.*, 140 Pa. St. 623; 21 Atl. Rep. 427; *Woodward v. Delaware, etc., Co.*, 121 Pa. St. 344; 15 Atl. Rep. 622; *State v. Moore*, 12 Cal. 56.

³⁹ *Logan v. Washington Co.*, 29 Pa. St. 373; *City of Scranton v. Gilbert*, 16 W. N. C. (Pa.) 28.

⁴⁰ *City of Scranton v. Gilbert*, 16 W. N. C. (Pa.) 28.

⁴¹ *Gribbens v. Atkinson*, 64 Mich. 351; 31 N. W. Rep. 570.

ment to defray the cost of sewer, or the payment for the cost of grading a street.⁴² Where a party was seized of what is called in Pennsylvania unseated land subject to a mineral reservation of oil and mineral rights, it was held that there was no such a personal obligation of the owner to pay taxes as rendered him liable to the owners of the oil or mineral rights for taxes paid by him to prevent a sale, there being no such a community of interest between them as implied a promise to pay.⁴³ After mineral has been severed from the soil it becomes the personal property of the lessee, and is taxable to him.⁴⁴ Where a statute provided that the person in possession of real estate, whether he held its fee simple or as a life estate, should be deemed the owner for the purpose of taxation, it was held that a conveyance by the owners of land of the oil and gas to a third person, upon condition that the grantee pay a certain amount of money to the grantors within a specified time after the completion of the well on the land, and providing that if the money was not paid within that time the grant should be void, that the right thus given was taxable to the grantee as real estate.⁴⁵ In such an instance an assessment of the lessee's or grantee's interest as personal property is void.⁴⁶ But where a statute provides for the taxation of mineral in place the same as land, oil and gas in the ground cannot be taxed to the person who has acquired the right to drill for them for a certain time, and who is to pay a specified amount of them as royalty.⁴⁷ A tax law providing that the words personal property shall include all fixtures

⁴² *Pettibone v. Smith*, 150 Pa. St. 118; 24 Atl. Rep. 693; *Delaware, etc., Co. v. Von Storch*, 196 Pa. St. 102; 46 Atl. Rep. 375.

⁴³ *Neill v. Lacy*, 110 Pa. St. 294; 1 Atl. Rep. 325; *Powell v. Lantzy*, 173 Pa. St. 543; 34 Atl. Rep. 450.

⁴⁴ *Forbes v. Gracey*, 94 U. S. 762.

In Pennsylvania it has been held that a lessee's estate is not assessable as land conveyed to a grantee; but where the lessee is in fact the grantee of an interest in the coal, oil or gas underlying a tract, he

takes an estate in the land that is assessable as such. *Moore's Appeal*, 4 Pa. Dist. Rep. 703.

⁴⁵ *State v. Low*, 46 W. Va. 451; 33 S. E. Rep. 271.

⁴⁶ *Carter v. County Court*, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725.

⁴⁷ *Jones v. Wood*, 2 Ohio Dec. 75; 9 Ohio Cir. Rep. 560; 6 Ohio Cir. Dec. 538, reversing 1 Ohio N. P. 155; *Moore's Appeal*, 4 Pa. Dist. Rep. 703.

attached to land, not included in the valuation of such land as entered upon the proper tax duplicate, all appliances used in producing oil, such as pump, tanks, boilers, are taxable as personal property.⁴⁸ Coal in place belonging to one not owning the surface under which it lies may be assessed as land apart from the surface.⁴⁹ And the word "held" in a statute providing that when coal or gas privileges are "held by a party or parties, company or association, exclusive of the surface, the same shall be assessed separately to such" party or association,⁵⁰ must be construed as "owned," and such privileges or interest cannot be assessed to a mere lessee.⁵¹

⁴⁸ Carter v. County Court, *supra*.

⁴⁹ Consolidated Coal Co. v. Baker, 135 Ill. 545; 26 N. E. Rep. 651.

⁵⁰ Acts of W. Va., 1891, Chap. 36, Sec. 4.

⁵¹ United States Coal, etc., Co. v. Randolph County Court, 38 W. Va. 201; 18 S. E. Rep. 566.

CHAPTER XXXIII.

MISCELLANEOUS.

- §742. Artificial gas statutes do not relate to natural gas.
- §742. Larceny of gas.
- §744. "Shut off gas," meaning.
- §745. Contract for purchase of oil.
- §746. Term "fire proof oil" as a trademark.
- §747. Gas company's liability for supplies.
- §748. Gas not a necessary of life.

§742. Artificial gas statutes do not relate to natural gas.

Statutes relating to the manufacture and supply of gas enacted before natural gas was discovered in this country, as a rule do not apply to natural gas companies. In New York it has been held that a statute enacted in 1890, authorizing the formation of corporations for manufacturing and supplying gas for lighting streets and for buildings, and providing a penalty if they refused to supply gas to consumers on application, did not apply to natural gas companies incorporated under the "business corporations law" of 1875.*¹

§743. Larceny of gas.

To take artificial gas from a gas company with a felonious intent is larceny, even though the taker take it on his own

*¹ Wilson v. Tennent, 65 N. Y. Supp. 852; affirmed 61 App. Div. 100; 70 N. Y. St. Rep. 2.

A corporation organized under the general corporation law of New Jersey cannot conduct business as a gas company. Richards v. Dover, (N. J. L.); 39 Atl. Rep. 705.

Under Laws 1890, Ch. 566, Art.

6, Sec. 60, of New York, a company may be organized to supply both gas and electricity; and under Laws 1892, Ch. 688, Sec. 32, a gas company may enlarge its powers so as to manufacture and supply electricity. People v. Rice, 33 N. E. Rep. 846; 138 N. Y. 151.

land by secretly opening the gas company's service pipe laid therein for the purpose of supplying his house with gas. Thus to insert a pipe in the service pipe through which the gas flows to the burner direct and not through the meter, with the felonious intent to take it, and not pay for the same, is a larceny, there being a sufficient severance of the gas at the point of junction of the connecting pipe with the entrance pipe to constitute an asporation. It is immaterial whether the service pipe is the property of the taker or of the company.² If the pipe be kept full all the time, although the gas is repeatedly cut off at the point of consumption, there is a continuous taking, and not a series of separate takings; and there will be a continuous taking, even though the pipe has not been kept full, for it is usually substantially all one transaction.³

§744. "Shut off gas," meaning.

The printed regulations of a gas company provided that "the person sent to attend [to examine for leaking gas] is authorized to shut off the gas." In an action for personal injuries brought against a gas company, caused by an explosion of leaking gas, it was held that the gas company could show by parol evidence

² Regina v. White, 20 E. L. and Eq. 585; 17 Jur. 536; 3 Car. and K. 363; 6 Cox Cr. Cas. 213; Dears. C. C. 203; 22 L. J. (N. S.) 123; Beale's Cas. 506; Commonwealth v. Shaw, 4 Allen 308; 81 Am. Dec. 706; Beale's Cas. 506; Regina v. Mitchell, 22 Gas J. 137; Regina v. Jenkins, 5 Gas J. 214; State v. Wellman, 34 Minn. 221. See also Phoenix Gaslight, etc., Co. v. Shillits, 19 Gas J. 848.

³ Queen v. Firth, L. R. 1 Crown Cas. Res. 172; People v. Wilber, 4 Park. Cr. Rep. 19.

So far as the writer knows, there are no decisions concerning the larceny of natural gas; but inasmuch as natural gas confined in pipes

is subject to private ownership, there is no reason why the felonious taking of it from the pipe should not be a larceny, even a taking from the pipe in the well should be so considered. But a taking from the earth, by drilling a well would be a mere trespass. For larceny of water, see Ferens v. O'Brien, 11 Q. B. Div. 21; 15 Cox. C. C. 332.

As to such a concealment of a fraudulent taking of gas as will prevent the Statute of Limitations running, see Imperial Gaslight and Coke Co. v. London Gaslight and Coke Co., 10 Exch. 39; 26 E. L. and Eq. 425; 3 Gas J. 483.

that the direction to "shut off the gas" applied, in this connection, only to shutting off gas from houses and not from streets.⁴

§745. Contract for purchase of oil.

A refiner of oil, who purchases of a dealer, at current prices, all the crude oil he may need during a particular year, he agreeing to order more than a certain amount per month, does not prohibit him from ordering, at any time during the year, subject to the monthly limitations, such an amount of oil as he may need, for the entire year. He is bound to withhold his orders until he actually needs the oil; and if the vendor refuses to fill such orders, to the extent of the amount of oil proved to be needed, he is liable.⁵

§746. Term "fire proof oil" as a trademark.

The term "Fire Proof Oil" cannot be claimed successfully as a trademark for an illuminating oil. The reason is that such words are descriptive of oil, which is not inflammable, although it is not literally proof against fires.⁶

§747. Gas company's liability for supplies.

A corporation organized to manufacture and supply illuminating and heating gas may purchase the right to use and deal in steam-heaters, radiating mantels, and gas consuming appliances, if such purchases are advantageous to its business

⁴ *Bartlett v. Boston Gaslight Co.*, 117 Mass. 533.

Under a statute declaring it unlawful for any person to turn off any valve belonging to any person furnishing gas to consumers without permission of the owner, the doing of the act, without consent, is unlawful, without any reference to the intent of the doer. *State v. Moore*, 27 Ind. App. 83; 60 N. E. Rep. 955. In this case the lessee

was taking off gas from the leased premises in violation of the terms of the case; and it was held that the lessor could not shut off the gas, but, to secure relief, must resort to his legal remedy.

⁵ *Willock v. Crescent Oil Co.*, 184 Pa. St. 245; 28 Pittsb. L. J. (N. S.) 351; 39 Atl. Rep. 77.

⁶ *Scott v. Standard Oil Co.*, 106 Ala. 475; 19 So. Rep. 71; 31 L. R. A. 374.

as a manufacturer and distributor of gas.⁷ If it purchase gas pipes, to be of good material and workmanship and they are defective and with flaws so gas escapes, and it lay such pipes in the soil without knowledge of the defects and flaws, it may recover damages from the vendor, or recoup them when sued for the price of the pipes, which will cover the cost of taking out the pipes to replace them with others, including the relaying of new pipes.⁸

§748. Gas not a necessary of life.

Where a husband left his wife, and she continued to use gas in the house as usual, it was held that he was not liable for the gas thus used.⁹

⁷ *Malone v. Lancaster, etc., Co.*, 182 Pa. St. 309; 40 W. N. C. 434; 14 Lanc. L. Rev. 321; 15 Nat. Corp. Rep. 98; 37 Atl. Rep. 932.

⁸ *Smith v. Citizens', etc., Co.*, 5 W. N. C. 97.

⁹ *Kettening Gas Co. v. Leach*, 24 Gas. J. 503.

APPENDIX.

GAS AND OIL LEASES AND AGREEMENTS.

INDIANA.

GRANT OF OIL AND GAS.

IN CONSIDERATION of the sum of.....Dollars, and the covenants and agreements hereinafter contained.....first part..hereby grant unto.....second party, his heirs or assigns, all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon for the purpose of drilling or operating for oil or gas; to erect, maintain and remove all structures, pipe lines, and machinery necessary for the production and storage of oil, gas or water, namely: A lot of land situated in the Township of.....County of.....in the State of.....bounded and described as follows.....containingacres, more or less.

The above grant was made on the following terms:

Should oil be found in paying quantities upon the premises, second party agrees to deliver to the first party in the pipe line with which he may connect the well or wells, the.....part of all the oil saved from said premises.

If gas only is found, second party agrees to pay.....each year for the produce of each well while the same is being used off the premises, and first party shall have gas free of expense to light and heat the dwellings on the premises.

The second party shall have the right to use sufficient gas or water to run all machinery used by him in carrying on his operations on said premises, and the right to remove all his property at any time.

If no well is drilled within.....from this date then this grant shall become null and void unless second party shall pay to the first partyfor each.....thereafter such completion is delayed.....

IN WITNESS WHEREOF, The parties have hereunto set their hands this.....day of.....A. D. 190...

WITNESS:
.....
.....

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant unto..... second party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, and to erect and maintain all buildings and structures, and lay all pipe necessary for the production and transportation of oil, gas and water from said premises. Excepting and reserving, however, to first part..thepart of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect its wells, namely: All that certain lot of land situated in the Township of..... County of.....in the State of.....bounded and described as follows, to-wit:.....containing.....acres more or less.

Second party agrees, if gas is only found, to pay.....Dollars each year, in advance, for the product of each well while the same is being used off the premises, and first party to have gas free of cost to heat..... stoves in dwelling house during the same time.

Whenever first part..shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said pipe lines.

No well shall be drilled nearer than.....feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is.....within.....from this date, then this grant shall become null and void, unless second party shall pay to said first part.....Dollars in advance for each.....thereafter such..... is delayed.

The second party shall have the right to use sufficient gas, oil and water. for all their operations, and also the right to remove all its property at any time, including the right to draw and remove casing.....

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors and assigns.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals this.....day of.....A. D. 19...

..... (Seal)
 (Seal)
 (Seal)

STATE OF INDIANA, }
 COUNTY OF..... } ss.

On the.....day of.....A. D. 19..., before me, the subscriber, a..... in and for said county, personally appeared.....to me known to be the person named in, and who executed the foregoing instrument, and in due form of law acknowledge the same to be.....act and deed, for the uses and purposes therein mentioned, and desired that it might be recorded as such.

Witness my hand official seal.

..... (Seal)

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant..unto..... second part.., successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, and to erect and maintain all buildings and structures, and lay all pipe necessary for the production and transportation of oil, gas and water from said premises. Excepting and reserving, however, to first part..the.....part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect the wells, namely: All that certain land situate in the Township of....., County of....., in the State of Indiana, described as follows, to-wit:.....containingacres more or less.

This grant is made for the period of five years from this date and as much longer as oil or gas is found in paying quantities under the terms and conditions herein contained.

Second part..agree.., if gas only is found, to pay.....Dollars each year, payable.....in advance, for the product of each well while the same is being used off the premises, and first part..to have gas free of cost, at the well, for domestic purposes on the farm.

Whenever first part..shall request it, second part..shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said gas lines.

No well shall be drilled neared than.....feet to the house or barn on said premises, and no well shall occupy more than one acre. The first part..shall fully use and enjoy said premises for farming purposes, except such parts as may be necessary for said operations.

In case no well is.....within.....from this date, then this grant shall become null and void, unless second part..shall pay to said first part..in advance for each..... thereafter such.....is delayed.

Payments to be made as herein provided may be made direct to first part..or deposited to first party's credit in.....

It is understood and agreed between the parties hereto, that, second part..by giving to first part..thirty days' notice in writing of a desire to surrender this grant, may do so upon the payment to first part..of the sum of one dollar and releasing the same of record, and thereby be released from all further liabilities hereon.

The second part..shall have the right to use sufficient gas, oil and water, for all operations hereunder, and also the right to remove all property at any time, including the right to draw and remove casing.
.....

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors and assigns.

In Witness Whereof, the parties have hereunto set their hands and seals, this.....day of.....A. D. 190...

WITNESS: (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

STATE OF INDIANA, COUNTY OF....., ss:

Before me, the undersigned Notary Public, personally appeared the within named.....and severally acknowledged the execution of the foregoing instrument to be.....free act and deed.

Witness my hand and official seal, this.....day of.....190...
..... (Seal)
Notary Public.

Commission expires.....190...

STATE OF INDIANA, COUNTY OF....., ss:

Before me, the undersigned Notary Public, personally appeared the within named.....and severally acknowledged the execution of the foregoing instrument to be.....free act and deed.

Witness my hand and official seal, this.....day of.....190...
..... (Seal)
Notary Public.

Commission expires.....190...

OIL OR GAS LEASE.

THIS LEASE, Made this.....day of.....A. D. 190., by and betweenof the County of.....and State of Indiana of the first part, and The Hancock Oil Company of the second part,

WITNESSETH, That the said part..of the first part, in consideration of \$1.00 in hand paid, the receipt of which is hereby acknowledged, and the stipulations, rents and covenants hereinafter contained, on the part of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed, have granted, demised and let unto the said party of the second part, his executors, administrators and assigns, for the sole and only purpose of drilling and operating for Petroleum Oil or Gas for the term of.....years with the privilege of.....years thereafter on the same terms and conditions at the option of the lessee. Said lessee to give thirty day's notice in writing before the expiration of said year of its intention to avail itself of said option, or as long thereafter as Oil or Gas is found in paying quantities, all that certain tract of land situated in.....Township.....County, State of Indiana, Being the.....Containing.....acres, more or less; excepting and reserving therefrom.....acres around the buildings on said premises, upon which there shall be no wells drilled; the boundaries of which shall be designated and fixed by the part..of the first part.

The said second party hereby agrees in consideration of the said lease of the above described premises, to give said first part.....Royalty Share.. of all the oil or mineral produced and saved from said premises, except for

operating purposes on the premises, delivered in tanks or pipe lines to the credit of first part... And further agrees to give \$.....per annum for the gas from each and every well drilled on the above described premises, in case the gas be found in quantity to transport off the above described premises, and convey to market, which the second party is to be the sole judge thereof. The said second party not to unnecessarily disturb growing crops thereon, or the fences.

Said second party has the right, which is hereby granted him, to enter upon the above described premises at any time for the purpose of mining or excavating, and the right of way to and from the place of mining or excavating and the right to lay pipe lines for the purpose of conveying or conducting water, steam, gas, or oil over and across said premises, and also the right to remove at any time any or all machinery, oil well supplies or appurtenances of any kind belonging to the said second party.....

The party of the second part agrees to commence one well..... from the date hereof (unavoidable accidents and delays excepted), and in case of failure to commence one well within such time, the party of the second part hereby agrees to pay thereafter to the part..of the first part for any future delay, the sum of.....dollars per annum as a rental on the same thereafter until a well is commenced or the premises abandoned, payable at.....and the part..of the first part hereby agree..to accept such sum as full consideration and payment for such yearly delay until one well shall be commenced, and a failure to commence one well or to make any of such payments within such time and at such place as above mentioned, renders this lease null and void, and neither party hereto shall be held to any accrued liability, otherwise to be and remain in full force and virtue.

It is understood by and between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second part, have hereto set our hand and seals the day and year first above written.

..... (Seal)

..... (Seal)

THE.....COMPANY,

By.....

President.

Attest:.....

Secretary.

STATE OF INDIANA. }
COUNTY OF..... } ss:

Before me, the undersigned, a Notary Public in and for said county, this.....day.....of.....190.., personally appeared.....and the Hancock Oil Company by its officers, William C. Dudding, President, and Ephraim Marsh, Secretary, and acknowledged the execution of the foregoing agreement.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal, this.....day of....., 190...

.....
Notary Public.

AGREEMENT TO DRILL WELL.

AGREEMENT made and concluded this.....day of.....1899 by and between The Rowland-Zeiglar Oil Co., of Montpelier, Ind., party of the first part, and.....of.....party of the second part.

WITNESSETH, the first part hereto agrees to furnish one wood rig, the necessary drive pipe and casing on.....farm in Section.....in the Township of.....County of.....in the State of Indiana. Also shot, rods, pumping outfit and tank provided well proves a producer and the second party hereto, in consideration of.....cents per foot (which sum is to be paid to second part by first part when job is completed in accordance with the contract hereinafter set forth) agrees at his own cost and risk, furnishing all else that is necessary for the proper completion of an oil or gas well; and to effectually shut off all fresh water by making the casing entirely tight, a test of the casing to be made by use of the Device known as the casing tester, by first part on notice from second part that the well is on top of the sand, and to drill said well into the Trenton rock to any depth that the first part elects, not to exceed one hundred feet; to clean out after shot, on the following day from that on which the shot is put in, fit up and start said well to pumping in first-class shape.

Provided the well should prove a gas producer, to pack the well with the material furnished by first part for same, and making it an entirely tight job. And provided, further, that if neither gas or oil is found in paying quantity and the first part would want the piping and casing pulled out of said well, the second party hereto agrees to plug the well in accordance with the law and pull the piping without further charge excepting that the first part must pay for the use of the jacks or cutters if the same are required.

In the event the second party finds it necessary to have a water well at the said location, the first part agrees to furnish the necessary casing for the same, only.

.....
.....
.....

KANSAS

OIL, GAS AND MINERAL LEASE.

THIS LEASE, Made between....., party of the first part, and parties of the second part, WITNESSETH, that in consideration of One Dollar, the receipt of which is hereby acknowledged, and the further consideration of drilling or excavating test wells in..... County, Kansas, for Oil, Gas and other minerals, or prospecting for other minerals.....party of the first part hereby agree with parties of the second part: That they shall have the exclusive right for Ten Years from this date to enter upon and operate for Oil, Gas and other Minerals all that certain tract of land in.....township.....County, Kansas, described as follows, to wit:

.....Section.....Twp,Range,Acres.....Containing
acres, more or less, upon the following terms and conditions:
 Second parties shall deliver in tanks at the wells to the first party without
 cost, one-tenth of all Oil, produced on these premises; second parties shall
 also pay Fifty Dollars per year for each Gas well of sufficient capacity to
 utilize when used off the premises, and deliver on the dump, to the first
 party without cost, one-tenth of all mineral produced on these premises.
 If Oil, Gas or other Mineral is found in paying quantities in any well
 drilled, the privilege of operating shall continue as long as Oil, Gas or
 other Mineral shall be produced in paying quantities and when abandoned
 for such purposes this grant shall cease, and no longer be binding on
 either party. If Gas is found on the above described land the party of
 the first part is to have same for domestic purpose free. The second
 party reserves the right to remove all machinery and fixtures placed
 thereon by them. In case no Oil or Gas well is sunk or prospecting for
 other Mineral done on these premises within five years from this date
 this lease shall become absolutely null and void unless the second parties
 shall from year to year continue this lease by paying or depositing to the
 credit of the first party each year in advance.....Dollars at the.....
 until a well is completed or other prospecting done on the premises.....
 Party of the first part further agrees that for and in consideration of the
 considerations and covenants above contained that second party at..option
 may any time within.....year from this date purchase the above de-
 scribed property by paying.....Dollars per acre and first party at such
 payment agrees to deliver deed of above property free from all liens and
 encumbrances whatsoever. It is understood by and between the first and
 second parties to this agreement that all the conditions between the parties
 hereto shall extend to their heirs, executors and assigns.

IN WITNESS of which we hereunto set our hands and seal this the....
 day of.....A. D. 190...

.....(Seal)
 WITNESSES:(Seal)
(Seal)
(Seal)

STATE OF KANSAS, }
 COUNTY OF..... } ss

BE IT REMEMBERED, That on this.....day of.....190..., personally
 appeared before me.....personally known to me to be the persons
 who executed the foregoing instrument and said persons acknowledged the
 execution of the same.

In Witness Whereof I hereunto subscribe my name and affix my official
 seal.

My Commission expires on the.....day of.....190...

OIL AND GAS LEASE.

IN CONSIDERATION of the sum of One Dollar, the receipt of which is
 hereby acknowledged, and of the covenants and agreements hereinafter
 contained.....first party, hereby grant unto Lanyon Zinc Company,

a New Jersey Corporation, second party, successors and assigns, all the Oil and Gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, to erect, maintain and remove all buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil, gas or water.

PROVIDED: That the first party shall have the right to use said premises for farming purposes except such part as is actually occupied by second party, namely: A lot of land situated in the township of....., County of....., in the State of.....Section number.....Township number.....Range number.....containing.....acres, more or less.

THE ABOVE GRANT WAS MADE ON THE FOLLOWING TERMS:

1st. Second party agrees to drill a well upon said premises, within one year from this date, or thereafter pay to first party.....Dollars annually until said well is drilled, or the property hereby granted is conveyed to the first party.

2nd. Should Oil be found in paying quantities upon the premises, second party agrees to deliver to first party in tanks or in the pipe line with which it may connect the wells, the one-tenth part of all the oil produced and saved from said premises.

3rd. Should Gas be found, second party agrees to pay to first party Fifty Dollars annually for every well from which Gas is used off the said premises.

4th. The first party shall be entitled to enough Gas free of cost for domestic use in the residence on said premises as long as second party shall use Gas off said premises under this contract, but shall lay and maintain the service pipe at his own expense and use said Gas at his own risk. The said party of the second part further to have the privilege of excavating for water and of using sufficient water, Gas and Oil from the premises herein leased to run the necessary engines for the prosecution of said business.

5th. Second party shall bury, when requested to do so by the first party, all Gas lines used to conduct Gas off said premises and pay all damages to timber and crops by reason of drilling or the burying, repairing or removal of lines of pipe over the said premises.

6th. No well shall be drilled nearer than.....feet to any building now on said premises, nor occupy more than one acre.

7th. Second party may at any time remove all his property and re-convey the premises hereby granted and thereupon this instrument shall be null and void.

8th. A deposit to the credit of lessor, his heirs, executors or assigns in.....Bank, to the account of any of the money payments herein provided for, shall be a payment under the terms of this lease.

9th. If no well shall be drilled upon said premises within five years from this date, second party agrees to re-convey, and thereupon this instrument shall be null and void.

10th. A failure by second party to comply with any of the above conditions shall render this lease null and void.

IN WITNESS WHEREOF, the parties hereunto have set their hands and seal this.....day of.....A. D., 190...

Signed, sealed and delivered in the presence of

..... (Seal)
..... (Seal)
..... (Seal)
.....COMPANY.
By..... (Seal)

COUNTY OF..... }
STATE OF KANSAS, } ss

BE IT REMEMBERED, That on the.....day of.....A. D., 190..., before me a Notary Public for the County and State aforesaid camepersonally known to me to be the same persons who executed the foregoing instrument and said persons duly acknowledge the execution of the same.

Witness my hand and official seal the day and year aforesaid.

My commission expires the.....day of.....A. D., 190...
....., Notary Public.

OHIO

OIL AND GAS LEASE.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant unto.....second party, successors or assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil, gas or water from or over said premises. Excepting and reserving, however, to first party the.....part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect.....wells, namely: All that certain lot of land situated in the Township of..... County of.....in the State of.....bounded and described as follows, to-wit:

To have and to hold the above premises, for the said purposes only, for and during the term of twelve years,from the date hereof, and as much longer as Oil or Gas shall be found in paying quantities.

If gas only is found, second party agrees to pay.....dollars each year, in advance, for the product of each well while the same is being sold off the premises, the first party to have gas free of cost at the well to heatstoves in dwelling house during the same time.

Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said pipe lines.

No well shall be drilled nearer than.....feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is completed within.....from this date, then this grant shall become null and void, unless second party shall pay to the said first party.....dollars in advance for each year such completion is delayed.

The second party shall have the right to use sufficient gas, oil or water to run all necessary machinery for operating said wells, and also the right to remove all of his property at any time.

It is expressly stipulated and agreed that the party of the second part may, at any time in its option, in consideration and payment of one dollar to the party of the first part, his heirs or assigns, surrender and cancel this lease and terminate all right and rescind all obligations of either and all of the parties hereto, their successors, heirs or assigns.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this.....day of.....A. D., 190...

Signed, sealed and delivered in the presence of

..... (Seal)
..... (Seal)
..... (Seal)

STATE OF.....,COUNTY, ss:

Before me,, a..... in and for said County and State, personally appeared.....and acknowledged the execution of the within lease to be.....voluntary act and deed.

WITNESS, My hand and.....Seal, this.....day of.....190...
..... (Seal)

OIL AND GAS LEASE.

AN AGREEMENT, Made the.....day of.....A. D., 190..between
.....of the.....County of..... and State of.....Lessor..and.....
of.....Lessee...

WITNESSETH, That the lessor, in consideration of ONE DOLLAR, the receipt of which is hereby acknowledged, and of other valuable considerations do..hereby demise, grant and let unto the lessee.....heirs and assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of operating thereon for said oil and gas, together with the right of way, the right to lay pipes over, to use water from, and also the right to remove, at any time, all property placed thereon by the lessee.. which tract of land is situated in the.....of.....County of.....and State of.....and is bounded and described as follows, to-wit:..... To have and to hold the same unto the lessee..heirs and assigns for the term and period of.....year..from the date hereof, and as much longer as oil or gas is found in paying quantities thereon or the rental paid by lessee.

The lessee..shall pay to the lessor..the.....part of all the oil produced and saved from the premises, and deliver free of expense into tanks

or pipe lines to the lessor's credit, and should any well produce gas in sufficient quantities to justify marketing, the lessor..shall be paid at the rate of.....dollars per year for such well so long as the gas therefrom is sold.

If no well be completed on the above described premises within..... from the date hereof, then this lease shall become null and void unless the lessee..shall thereafter pay for further delay at the rate of..... dollars per year until a well shall be completed. Said amount may be paid in hand or by deposit to the lessor's credit.

The lessor to have sufficient gas for heating dwellings on said premises free of charge at the wells. All pipe lines to be buried below plow depth.

It is further agreed, that the lessee shall pay all damage done to growing crops and shall operate the well within three months after said well is completed.

It is fully understood by and between the parties hereto, that the rights and privileges herein conferred shall be construed to mean simply a lease of privilege to drill and operate as above set forth, for gas and oil; and any attempt, on the part of the second party, to exceed the privileges granted, as so construed, shall render the same liable for trespass; and, furthermore, shall work a forfeiture of all the rights conferred, and this instrument shall become null and void.

IT IS FURTHER AGREED, That the lessee..shall have the right at any time to surrender this lease to the lessor..and thereby be fully discharged from any and all damages or claims whatsoever arising from any neglect or nonfulfillment of the foregoing contract.

It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, The said parties have hereunto set their hands and seal the day and year first above written.

Sealed and delivered in the presence of

..... (Seal)
..... (Seal)
..... (Seal)

STATE OF OHIO }
COUNTY OF..... } ss.

On this.....day of.....A. D., 190..before me, a.....in and for said county, personally appeared the above named.....and acknowledged that.....did sign and seal the within instrument, and that the same is.....free act and deed for the purpose herein named.

..... (Seal)

GAS AND OIL LEASE.

IN CONSIDERATION of the sum of One Dollar, the receipt of which is hereby acknowledged.....of.....of the First Part, hereby Grant and Guarantee unto.....Second Party all the Oil and Gas in and under the following described premises, together with the right to enter thereon

at all times for the purpose of Drilling and Operating for Oil and Gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of Oil and Gas. The First Party shall have the one-eighth (1-8) part of Oil produced and saved from said premises, to be delivered to the Pipe Line with which Second Party may connect.....wells, namely: All that certain lot of land, in the Township of.....County of.....in the State of.....bounded and described as follows, to-wit:.....containing.....acres, more or less.

To have and to hold the above described premises on the following conditions, for and during the term of Five years from the date hereof and as long after said term of years as Oil and Gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided.

If Gas only is found, in sufficient quantities to transport, Second Party agrees to pay First Party One Hundred (\$100) Dollars annually for the product of each and every well so transported, and First Party to have Gas free of cost for heating and lighting purposes in dwelling house. Second Party shall bury all Oil and Gas lines when same interfere with cultivation, and pay all damages done by reason of operating under this grant.

It is agreed that Part..of the Second Part is hereby given the option to purchase the above described land at the sum of.....Dollars per acre on or before the.....day of....., 190...

In case no well is commenced within.....from this date, then this grant shall become null and void unless Second Party shall thereafter pay at the rate.....Dollars for each year such commencement is delayed. A deposit to the credit of the First Party in.....will be good and sufficient payment for any money falling due on this grant. First Party has right to locate roads to and from places of operation.....

The Second Party shall have the right to use sufficient Gas, Oil and Water to run all machinery for operating said Wells, also the right to remove all its property at any time, and may cancel and annul this contract or any undrilled portion thereof at any time upon payment of One Dollar to said First Party and releasing the same of record.

It is understood between the parties of this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assignees.

IN WITNESS WHEREOF, The parties hereunto set their hands and seals this.....day of.....A. D., 190...

.....
.....
.....

STATE OF INDIANA, COUNTY OF.....ss:

Before me....., a Notary Public in and for said County, this..... day of....., 190..., personally appeared the above named..... to me well known, and acknowledged the execution of the above and foregoing instrument to be their free act and deed.

Witness my hand and Notarial seal this day and year above written.

My commission expires.....190... ..

WITNESSETH, That the lessor . . . , in consideration of Dollars, the receipt whereof is hereby acknowledged, does hereby grant, demise and let unto the said lessee, all the oil and gas in and under the following described tract of land, with covenant for the lessee's quiet enjoyment of the term, and that lessor has the right to convey the premises to the said lessee; together with the exclusive right unto the lessee to operate and drill for petroleum and gas, to lay and maintain pipe lines, and erect and maintain telephone and telegraph lines, and buildings convenient for such operations; with the right to use water and gas from said lands, and right of way over same for any purpose, and right of ingress, egress and regress for such purposes, and of removing, either during or at any time after the term hereof, any property or improvements placed or erected in or upon said land by said lessee; with the right of sub-dividing and re-leasing all that tract of land situate in the of County of and State of and bounded and described as follows, to-wit:

On the North by the lands of ; on the East by the lands of ; on the South by the lands of ; on the West by the lands of Containing acres, more or less.

TO HAVE AND TO HOLD unto and for the use of the lessee for the term of years from the date hereof and as much longer as oil or gas is produced in paying quantities, yielding to the lessor the one-eighth part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and should a well be found producing gas only, then the lessor shall be paid for each such gas well at the rate of Dollars for each year, so long as the gas is sold therefrom, payable quarterly while so marketed.

PROVIDED, That this lease shall become null and void unless operations shall be commenced on the premises and a well completed, unavoidable delay or accident excepted, within months from the date hereof, or, unless lessee shall pay at the rate of Dollars per , payable in advance or within ten days thereafter for each additional such completion of well is delayed; and the completion of such well, productive or otherwise, shall vest in lessee, during the remainder of the term of this lease, rental free, the grant hereunder including the exclusive right to make such other and further search for oil or gas as lessee may wish.

Lessor is to fully use and enjoy said premises for the purpose of tillage, except such parts as may be used by lessee for the purposes aforesaid. Lessee is not to put down any well on the lands hereby leased within ten rods of the buildings now on said premises without the consent of the lessor in writing. Lessor may, if any well or wells on said premises produce sufficient gas, have gas for domestic purposes for one family, the lessor paying for connections at such point as may be from time to time designated by lessee.

The above rental shall be paid to lessor in person or by check deposited in postoffice directed to And it is further agreed, that lessee shall have the right at any time to surrender this lease, whereupon this lease shall be null and void; and that all conditions, terms and limitations

between the parties hereto shall extend to their heirs, personal representatives and assigns.

IN WITNESS WHEREOF, We, the said parties hereto, have hereunto set our hands and seals the day and year first above written.

WITNESS:

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

STATE OF WEST VIRGINIA, COUNTY OF....., To-wit:

I,a.....of said County of....., do certify that.....andhis wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....
.....

STATE OF OHIO, COUNTY OF....., ss.

Be it remembered that on this.....day of.....A. D., 190..before me, a.....in and for said county, personally appeared the above namedto me personally known to be the part..named in and who executed the within agreement and acknowledged to be.....act and desired the same to be recorded.

Witness my hand and.....seal the day and year aforesaid.

.....(Seal)

OIL AND GAS LEASE (NEW).

AGREEMENT, Made and entered into the.....day of.....A. D., 190.., by and between.....of.....County of.....and State of..... part..of the first part, and.....part..of the second part:

WITNESSETH, That the said part..of the first, for and in consideration of the sum of.....Dollars to.....in hand well and truly paid by the said part..of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, ha.. granted, demised, leased and let, and by these presents do..grant, demise, lease and let unto the said part..of the second part,.....heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas. and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, ALL that certain tract of land, situate in.....District.....County and State of.....on waters of.....bounded substantially as follows:

North by lands of.....; East by lands of.....; South by lands of, and West by lands of..... Containing.....acres, more or less, and being same land conveyed to the first part..by.....by deed, bearing date....., 190.., reserving, however, therefrom.....feet around the buildings on which no well shall be drilled by either party except by mutual consent.

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled, then and from that time this lease and agreement shall be null and void and no longer binding on either party, and the payments which shall have been made shall be held by the party of the first part as the full stipulated damages, for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, we, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

WITNESS:

..... (Seal)
..... (Seal)

COMMONWEALTH OF.. }
COUNTY OF..... }

BE IT REMEMBERED, That on the.....day of.....A. D. 190.. before me, a.....in and for said county, personally came the above named.....and in due form of law acknowledged the above indenture to be.....act and deed, and desired that the same might be recorded as such.

..... (Seal)

AGREEMENT.

[Entered according to the Act of Congress in the year 1886, by J. A. Heydrick, of Butler, Pa., in the office of Librarian of Congress at Washington, D. C., and used with his permission.]

THIS AGREEMENT, Made and entered into this.....day of..... A. D. 190., by and between.....of the first part, and.....of the second part.

WITNESSETH, That the said.....for and in consideration of the sum of.....Dollars, to.....well and truly paid by.....the receipt and payment of which is hereby acknowledged, has sold, granted, conveyed, assigned, transferred and set over and by these presents do sell, grant, convey, assign, transfer and set over unto the said.....heirs and assignsinterest in the within lease made by.....to.....on theday of.....190., with.....of the property, rights of property, interest, powers and possessions of every kind therein conveyed, all and singular, subject to the conditions therein specified.....

IN WITNESS WHEREOF, The parties have hereunto set their hands and seals the day and year first above written.

WITNESS:

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

COMMONWEALTH OF.. }
COUNTY OF..... } ss.

BE IT REMEMBERED, That on the.....day of.....A. D. 190.. before me, a.....in and for said county, personally came the above namedand in due form of law acknowledged the above indenture to be.....act and deed, and desired that the same might be recorded as such.

.....(Seal)

OHIO AND WEST VIRGINIA

OIL LEASE.

AGREEMENT, made and entered into this.....day of.....A. D., 190., by and between.....of the county of.....and State ofparty of the first part and.....party of the second part.

WITNESSETH, That the said part..of the first part, for and in consideration of the sum of.....Dollars to him in hand well and truly paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns. for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease and sub-divide all that certain tract of land situate in.....district;county and State ofand bounded and described as follows, to-wit:

On the North by lands of.....; on the East by lands of.....; on the South by lands of.....; on the West by lands of.....; containingacres.....:.... The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of.....from the date hereof, and so long thereafter as oil or gas can be produced in paying quantities, or rental paid thereon.

The party of the second part, his heirs or assigns, agrees to give to the party of the first part one-eighth part of the petroleum obtained from said premises, as produced in the crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such parts as shall be necessary for said mining purposes, and a right of way over and across said premises to the place of mining or operating. The said party of the second part is further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, the right to remove any machinery, fixtures and buildings placed on said premises by said party of the second part, or those acting under him, and is not to put down any well for oil on the lands hereby leased within.....feet of the buildings now on said premises without the consent of both parties in writing.

Party of the second part agree to pay damage done to growing crops by their operations on said premises.

IT IS AGREED, That if gas is found, in paying quantities, the consideration in full to the party of the first part for gas shall be..... Dollars per annum for the gas from each well when utilized off the premises of the parties of the second part.

Part..of the first part to have gas for domestic purposes free by making his own connections to well or wells. Party of the second part to have privilege of disconnecting, pulling casing or abandoning said well or wells without becoming liable for any damage to party of first part.

The party of the second part agree to commence operations withinfrom the execution of this lease, or in lieu thereof thereafter pay to the said party of the first part.....until the work is commenced, payable at.....

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

In Presence of

.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

STATE OF WEST VIRGINIA,
COUNTY OF.....

To-wit:

I....., a.....of said county of....., do certify that.....andhis wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190..ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

THE STATE OF OHIO, }
COUNTY OF..... } ss.

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

OIL LEASE.

AGREEMENT, made and entered into this.....day of.....A. D., 190..by and between.....of the county of.....and State of.....party of the first part and.....party of the second part.

WITNESSETH, That the said part..of the first part, for and in consideration of the sum of.....Dollars, to him in hand well and truly paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease and sub-divide all that certain tract of land situate in.....district,county and State of..... and bounded and described as follows, to-wit:

On the North by lands of.....; on the East by lands of.....; on the South by lands of.....; On the West by lands of.....; containingacres, The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term offrom the date hereof, and so long thereafter as oil or gas can be produced in paying quantities, or rental paid thereon.

The party of the second part, his heirs or assigns, agrees to give to the party of the first part one-eighth part of the petroleum obtained from said premises, as produced in the crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such parts as shall be necessary for said mining purposes, and a right of way over and across said premises to the place of mining or operating. The said party of the second part is further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, the right to remove any machinery, fixtures and buildings placed on said premises by said party of the second part, or those acting under him, and is not to put down any well for oil on the lands hereby leased within ten rods of the buildings now on said premises without the consent of both parties in writing.

IT IS AGREED, That if gas is found, in paying quantities, the consideration in full to the party of the first part for gas shall be..... Dollars per annum for the gas from each well when utilized.

The party of the second part agree to commence operations withinfrom the execution of this lease, or in lieu thereof thereafter pay to the said party of the first part.....dollars per annum until the work is commenced. A failure to pay such rental shall render this lease null and void.

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease,

and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

In Presence of

.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

STATE OF WEST VIRGINIA, } To-wit:
COUNTY OF.....

I,a.....of said county of....., do certify that.....andhis wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....
.....

THE STATE OF OHIO, } ss.
COUNTY OF.....

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

.....

OIL AND GAS LEASE.

AGREEMENT OF LEASE, Made this.....day of.....A. D., 190.. between.....of....., Lessor., and....., Lessee., Witnesseth:

That the lessor does hereby grant unto lessee for the term of..... years (and so long thereafter as oil or gas is produced from the land leased and royalty or rentals paid by lessee therefor) the exclusive right to mine for and produce petroleum and natural gas from, and the possession of so much of.....acres of land.....Township.....County. State of.....as may be necessary therefor, with the right to use water and gas (if found) for the necessary engines, and to remove all machinery, fixtures, etc., placed by the lessee on the premises. Said land bounded: North by lands of.....; East by land of.....; South by lands of

....., and West by lands of..... No well will be drilled withinfeet of the buildings without the lessor's consent. The lessee to deliver to lessor, in pipe line, the one-eighth of all petroleum produced from the premises, and to pay.....dollars per annum for each gas well from which gas is marketed, payable yearly from the date and while the same is so utilized, and to pay all damages to growing crops. If gas is found on the premises the lessee is to have sufficient gas for fuel purposes in the operation of this lease; lessor is to have gas for household purposes free of charge. Lessee is to have all rights and privileges necessary for the proper use and enjoyment of this lease.

This lease to be null and void and no longer binding on either party if a well is not completed on the premises within.....months from this date, unless the lessee shall thereafter pay monthly to the lessor.....dollars per month for each month's delay in commencing said well. Each payment to extend the time for commencing for one month and no longer. A deposit to credit of lessor in.....Bank.....to be good payment of any moneys on this lease.

All grants and covenants to extend to the heirs and assigns of the parties hereto.

Witness the hands and seals of the parties.

WITNESS:(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

STATE OF OHIO,COUNTY, ss.

Be it remembered, that on the.....day of.....A. D., 190., before me, a.....in and for said County, personally came the above namedand in due form of law acknowledges the within agreement to be.....free act and deed, and desired that the same might be recorded as such.

.....(Seal)

STATE OF WEST VIRGINIA, COUNTY OF.....To-wit:

I,, a.....of said county of.....do certify that.....and his wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190., have this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190...

.....

ASSIGNMENT OF LEASE.

KNOW ALL MEN BY THESE PRESENTS, That.....for and in consideration of the sum of.....Dollars the receipt of which is hereby acknowledged, has this day transferred, conveyed and sold unto..... my.....interest in the foregoing lease.

WITNESS:
.....
.....
.....
.....

ACKNOWLEDGMENT OF TRANSFER.

STATE OF.....COUNTY OF....., To-wit:

I,, a.....of said county of....., do certify that..... whose name.....signed to the above writing bearing date the..... day of.....190., ha..acknowledged the same to be.....free act and deed before me in my said county.....

Given under my hand and notarial seal this.....day of.....190.. State of.....

.....County.....Office.....190...

The foregoing writing and the certificate of acknowledgment thereof were this day admitted to record in this office.

Teste:.....

OIL AND GAS LEASE.

AGREEMENT, Made and entered into the.....day of.....A. D., 190., by and between.....of.....County of.....and State of.....party of the first part, and.....party of the second part:

WITNESSETH, that the said party of the first part, for and in consideration of the sum of.....Dollars in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said party of the second part, his heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures, to take care of the said production. ALL that certain tract of land, situate in.....of.....County of.....and State of.....on waters of.....bounded substantially as follows:

On the North by lands of.....; on the East by lands of.....; on the South by lands of.....; on the West by lands of..... Containing.....acres, more or less.

IT IS AGREED that this lease shall remain in force for the term of ten years from this date, and as long as oil or gas, or either of them, is produced therefrom by the party of the second part, its successors and assigns.

IN CONSIDERATION OF THE PREMISES the said party of the second part covenants and agrees; 1st—To deliver to the credit of the first party, his heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal one-eighth part of all oil produced and saved from the leased premises; and 2nd—to pay.....Dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly, thereafter while the gas from said well is so used.

Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm, and to drill no well within.....feet of the buildings on these premises, except by consent of the first party.

Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within.....from the date hereof, or unless the lessee shall pay at the rate of.....Dollars quarterly, in advance for each additional three months such completion is delayed, from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payments may be made direct to the lessors or by check to order of.....deposited in the post office by registered letter directed to.....

IT IS AGREED that the second party shall have the privilege of using sufficient water from the premises to run all necessary machinery and at any time to remove all machinery and fixtures placed on said premises; and, further, shall have the right at any time to surrender this lease to the first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms, shall cease and determine, and this lease becomes absolutely null and void.

Witness the following signatures and seals:

WITNESS: (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

STATE OF WEST VIRGINIA, COUNTY OF.....To-wit:

I,a.....of said County of....., do certify that.....and..... his wife, whose names are signed to the within writing, bearing date theday of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

THE STATE OF OHIO, COUNTY OF....., ss.

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came.....andhis wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

OIL AND GAS LEASE (NEW).

THIS INDENTURE, Made the.....day of.....A. D., 1.....between.....of the.....of.....County of.....and State of..... lessor and....., lessee.

WITNESSETH, That the lessor . . . , in consideration of Dollars, the receipt whereof is hereby acknowledged, does hereby grant, demise and let unto the said lessee, all the oil and gas in and under the following described tract of land, with covenant for the lessee's quiet enjoyment of the term, and that lessor has the right to convey the premises to the said lessee; together with the exclusive right unto the lessee to operate and drill for petroleum and gas, to lay and maintain pipe lines, and erect and maintain telephone and telegraph lines, and buildings convenient for such operations; with the right to use water and gas from said lands, and right of way over same for any purpose, and right of ingress, egress and regress for such purposes, and of removing, either during or at any time after the term hereof, any property or improvements placed or erected in or upon said land by said lessee; with the right of sub-dividing and re-leasing all that tract of land situate in the of County of and State of and bounded and described as follows, to-wit:

On the North by the lands of ; on the East by the lands of ; on the South by the lands of ; on the West by the lands of Containing acres, more or less.

TO HAVE AND TO HOLD unto and for the use of the lessee for the term of years from the date hereof and as much longer as oil or gas is produced in paying quantities, yielding to the lessor the one-eighth part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and should a well be found producing gas only, then the lessor shall be paid for each such gas well at the rate of Dollars for each year, so long as the gas is sold therefrom, payable quarterly while so marketed.

PROVIDED, That this lease shall become null and void unless operations shall be commenced on the premises and a well completed, unavoidable delay or accident excepted, within months from the date hereof, or, unless lessee shall pay at the rate of Dollars per , payable in advance or within ten days thereafter for each additional such completion of well is delayed; and the completion of such well, productive or otherwise, shall vest in lessee, during the remainder of the term of this lease, rental free, the grant hereunder including the exclusive right to make such other and further search for oil or gas as lessee may wish.

Lessor is to fully use and enjoy said premises for the purpose of tillage, except such parts as may be used by lessee for the purposes aforesaid. Lessee is not to put down any well on the lands hereby leased within ten rods of the buildings now on said premises without the consent of the lessor in writing. Lessor may, if any well or wells on said premises produce sufficient gas, have gas for domestic purposes for one family, the lessor paying for connections at such point as may be from time to time designated by lessee.

The above rental shall be paid to lessor in person or by check deposited in postoffice directed to And it is further agreed, that lessee shall have the right at any time to surrender this lease, whereupon this lease shall be null and void; and that all conditions, terms and limitations

between the parties hereto shall extend to their heirs, personal representatives and assigns.

IN WITNESS WHEREOF, We, the said parties hereto, have hereunto set our hands and seals the day and year first above written.

WITNESS:

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

STATE OF WEST VIRGINIA, COUNTY OF....., To-wit:

I,a.....of said County of....., do certify that.....andhis wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....
.....

STATE OF OHIO, COUNTY OF....., ss.

Be it remembered that on this.....day of.....A. D., 190..before me, a.....in and for said county, personally appeared the above namedto me personally known to be the part..named in and who executed the within agreement and acknowledged to be.....act and desired the same to be recorded.

WITNESS my hand and.....seal the day and year aforesaid.

..... (Seal)

OIL AND GAS LEASE (NEW).

AGREEMENT, Made and entered into the.....day of.....A. D., 190., by and between.....of.....County of.....and State of..... part..of the first part, and.....part..of the second part:

WITNESSETH, That the said part..of the first, for and in consideration of the sum of.....Dollars to.....in hand well and truly paid by the said part..of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, ha.. granted, demised, leased and let, and by these presents do..grant, demise, lease and let unto the said part..of the second part,.....heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, ALL that certain tract of land, situate in.....District.....County and State of.....on waters of.....bounded substantially as follows:

North by lands of.....; East by lands of.....; South by lands of, and West by lands of..... Containing.....acres, more or less, and being same land conveyed to the first part..by.....by deed, bearing date....., 190., reserving, however, therefrom.....feet around the buildings on which no well shall be drilled by either party except by mutual consent.

IT IS AGREED that this lease shall remain in force for the term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, heirs, executors, administrators or assigns.

IN CONSIDERATION OF THE PREMISES the said part..of the second part covenants and agrees: 1st—To deliver to the credit of the first part. heirs or assigns free of cost, in the pipe line to which it may connect its wells, the equal. part of all oil produced and saved from the leased premises; and, 2nd—To pay. Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second part..covenant..and agree..to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And further to complete a well on said premises within. from the date hereof, or pay at the rate of. Dollars quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payments may be made direct to the lessor or deposited to. credit in.

IT IS AGREED that the second party shall have the privilege of using sufficient water from the premises to run all necessary machinery and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of. Dollars, at any time, by the part..of the second part, heirs, successors of assigns, to the part.. of the first, heirs successors or assigns, said part..of the second part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void.

Witness the following signatures and seals:

WITNESS.

. (Seal)
. (Seal)
. (Seal)
. (Seal)

STATE OF WEST VIRGINIA, COUNTY OF. To-wit:

I,, a. of said county of., do certify that. and his wife, whose names are signed to the within writing, bearing date the. day of. A. D., 190., have this day acknowledged the same before me in my said county.

Given under my hand this. day of. A. D., 190.

STATE OF OHIO,County, ss.

Be it remembered that on the.....day of.....A. D., 190., before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....dollars, the receipt of which is hereby acknowledged.....grantor, ha..granted and conveyed, and do..hereby grant and convey, subject to the following conditions, untograntee..all the Oil and Gas in and under the following described premises, to-wit: All that piece or parcel of land in the..... of.....county of.....and State of.....containing.....acres, be the same more or less.

This grant is subject, nevertheless, to any rights now existing to the lessee by virtue of the lease heretofore given on said land for oil and gas; but if said lease has expired or become void, or shall hereafter expire or become void, or if no such lease ever existed, said grantee shall have and is hereby granted, all the rights and privileges of drilling and operating on said land, to produce, store and remove the said oil and gas necessary and usually granted to the lessee in an oil and gas lease.

This grant and conveyance is made on condition that said grantee.. do..within.....days after a well shall have been drilled on said land to the usual depth for oil and gas, and been properly completed, tubed and tested for oil, pay unto the said grantor..the sum of.....dollars.

If said grantee shall, as he may do at his option, omit to pay the said sum of \$.....within the time aforesaid, then this grant shall become as absolutely null and void as though it had never been made, and said grantor shall retain the sum first above mentioned as full liquidated damages. Depositing the sum of \$.....in the bank at.....to the credit of said grantor shall be equivalent to payment of the same to and its acceptance by said grantor.

This grant shall expire.....years from this date, if no well shall have been drilled on said land by that time, unless the said sum of \$..... shall be paid without the well being drilled.

This grant and the conditions, terms and provisions thereof, shall apply and extend to the said grantor..and grantee, their heirs, executors, administrators and assigns.

IN WITNESS WHEREOF we have hereunto set our hands and seals thisday of.....A. D., 190. †

WITNESS:

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

OIL AND GAS.

I,for said county, do certify that.....and.....his wife, whose names are signed to the writing hereto annexed, bearing date theday of.....190..have this day acknowledged the same before me. Given under my hand this.....day of.....190..

.....
.....

TEXAS.

OIL AND GAS LEASE.

THIS LEASE, made and entered into this.....day of.....A. D., 190., by and between.....of.....State of.....lessor., andPetroleum Company, a Texas corporation, lessee, witnesseth:

The Lessor., for and in consideration of the sum of.....dollar., paid to the lessor..by the lessee, the receipt of which is hereby acknowledged, do..hereby grant, demise and let unto the lessee, its successors and assigns all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, together with the right-of-way and the right to lay pipes to convey water, oil, steam and gas, and to have sufficient water, oil and gas from the premises to drill and operate wells thereon and on adjoining leases, also such other privileges as are necessary for conducting said operations, and the right to remove at any time any and all property placed thereon by the lessee, all that certain tract or parcel of land situated in.....State of....., bounded and described as follows:.....containing..... acres, more or less, but no wells are to be drilled within.....feet of the present buildings without the consent of both lessor..and lessee.

TO HAVE AND TO HOLD the same unto the lessee for and during the term of ten years from the date hereof and as much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor.. the..... (..) part or share of all the oil saved from that produced on the premises, delivered free of expense at the well into.....tanks or pipe line to the lessor's credit, and should any well on said premises produce gas in sufficient quantities to justify the lessee marketing same off said premises, the lessor..shall be paid at the rate of.....dollars a year for each and every well, the product of which is marketed and sold off said premises, the first payment to mature sixty days after a well is turned into a pipe line for marketing and to be paid.....thereafter while the gas from said premises is so sold.

Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well is commenced on said premises within.....from the date hereof, or unless the lessee shall pay to the lessor..a delay rental of.....per annum, payable quarterly in advance for every three months such commencement is delayed from the time above specified until a well is commenced, such payments to be made direct to the lessor..either by check mailed to.....or deposit to.....

credit in.....at.....and in default of the payment of such rental when due this lease shall become null and void and of no effect.

It is expressly understood and agreed between the lessor..and the lessee herein that the said lessee shall have the right to hold this lease for the period of ten years as above provided, and as long thereafter as oil or gas in paying quantities is produced therefrom, if a well is commenced as above specified or if the rental is paid promptly when due, and the said sum of.....dollar..this day received by the lessor..from the lessee is a consideration for the right of the lessee to hold said lease during said term either by commencing a well on said premises as herein provided or by paying the rental above specified.

The lessee agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm.

It is agreed that all the conditions and terms herein shall extend to the heirs, executors, successors and assigns of the parties hereto.

In witness whereof the lessor..and the lessee have hereunto set their hands and seals the day and year first above written.

WITNESS:
.....
.....
.....

STATE OF TEXAS, }
COUNTY OF..... }

Before me, the undersigned authority, on this day personally appearedknown to me to be the person..whose name.....subscribed to the foregoing instrument and acknowledged to me that.....executed the same for the purposes and considerations therein expressed; and on this day also appeared before me....., wife of the said....., who having been examined by me privily and apart from her said husband, and having the said instrument by me fully explained to her, she the said....., acknowledged the same to be her act and deed, and declared that she had willingly executed the same for the purposes and considerations therein expressed and that she did not wish to retract it.

Given under my hand and seal of office this the.....day of.....A. D., 190...
.....

INDEX.

(References are to sections.)

A

ABANDONMENT —

- Acquiescence in, effect, 132
- Cessure of operations, 140
 - of work after operations begun, 141
- Distinction between abandonment and forfeiture, 137.
- Expense of drilling wells, recovery, 137
- Extension of time, 140
- Failure to drill wells on several leased premises, 129
- Forfeiture, *see*
- Inability to complete work, 173
- Intent to abandon necessary, 137
- Lessor consenting to, effect, 181
- Non-productive premises, 138
- Partial of leased premises, 169, 170
- Personal privilege, 137
- Rent falling due after abandonment, 137
- Suit to cancel lease, 186
- Surrender of leased premises, 142
- Temporary suspensions of work, effect, 140, 141
- Unprofitable lease, 99
- Waiver of or abandonment, 159, 160
- When completed, 137.

ACCEPTANCE —

- Of franchise is necessary, 471

ACCOUNT —

- Co-tenant must account to fellow servant, 278, 279
- Effect of rendering, 251
- Power of court of equity to enforce accounting between joint owners, 282
- Statute of Limitations does not bar right to an accounting, 301
- Suit to recover upon account rendered, 282

ACKNOWLEDGMENT OF LEASE —

- Defective, effect, 92

ACQUIESCENCE —

- Abandonment of damages occasioned by, 132
- Delay, effect, 131

ACTION —

- Assumpsit to recover price of gas, 545
- Forfeiture of right to occupy estate enforced by, 491
- Inspection of meter to secure, 555
- Right of action over by gas company against wrongdoer, 656
- Suit, *see*
 - to recover for gas supplied, 432

(References are to sections.)

- ADMINISTRATOR** —
Power to execute lease, 59
- ADVERSE POSSESSION** —
Ejectment, *see*
Possession of surface when adverse to owner of oil or gas, 295 to 299
- AFRICA** —
Oil wells, 7
- AGENT** —
May take lease after forfeiture of his principal's lease, 89
- ALASKA** —
Oil wells, 7
- ALLEGANY RIVER** —
Oil springs upon known to French, 2
- ANCIENTS** —
Knew of petroleum, 1
- APPURTENANCES** —
What passes as such on conveyance of leased premises, 74
- ARTICLES OF COMMERCE** —
Gas and oil are such articles, 350
- ARTIFICIAL GAS** —
Corporation for cannot supply natural gas, 478, 742
Gas, *see*
Natural Gas, *see*
- ASSIGNEE** —
Bound by agreements in lease, 203
Default, assignee cannot take advantage of, 195
Equitable, in possession of premises, 200
Forfeiture of lease may declare, 152
Liable to his assignor, 204 to 209, 215
Liability on covenants in lease or contract, 94
if he occupies under unassigned lease, 208
when he does not take possession, 209, 211
Notice to of prior lease, 69
Several successive assignees liable for rents, 210
Substitution of releases lessee, 212
- ASSIGNMENT** —
Assignee liable upon express covenants in contract, 95
Consent to of lighting contract, 414
Lighting contract may be assigned, 414
Rates for gas fixed in assignment, 395
Right to occupy streets, 477
- ASSIGNMENT OF LEASE** —
Assignees bound by agreements in lease, 95, 203
Consent, refusal to give, 196
Default in carrying out terms of lease, assignee cannot take advantage of, 195
Equitable assignee in possession of premises, 200
Interest assignee secures in lease, 194
Judicial sale, effect, 199
Lease, *see*
Lessee may make of lease, 193
Lessor may make of lease, 193
Liability of assignee, extent, 203 to 206
of assignee to his assignor, 215
of assignee of part interest in lease, 207

(References are to sections.)

- ASSIGNMENT OF LEASE — Continued.**
of assignee broadened by terms of assignment, 205
to assignee when not taking possession, 209, 210
if he occupies under unassigned lease, 208
Oil in tank does not pass, 254
Option carries, 198
Privity of estate, 203
Release of lessee by substitution of assignee, 212
Royalties, *see*
 may be assigned, 202
Statute of Frauds, effect upon, 94
Several successive assignees' liability, 210
Substitution of assignee is a surrender, 143
Sublessee, *see*
 when not liable, 217
Sublease is not an assignment, 197
Surrender of lease, 168
Unassignable, when, 201
- ASSIGNOR —**
Assignee liable to, 215
Liable on account of lease as surety, 216
- B**
- BABYLON —**
Petroleum used by ancients, 1
- BAKU —**
Oil and gas wells of, 1, 9
- BANKRUPT —**
Trustees of liable for gas rents, 546
- BARBADOES TAR —**
Use of as a medicine, 14
- BENZINE —**
Exploding when used in paint, 675
- BIDS —**
On lighting contracts, 41
- BISSELL, GEORGE H. —**
Formed first oil company, 5
Secured analysis of petroleum, 13
- BLANKS —**
In lease, 80
- BOUNDARY LINE —**
Draining premises by wells on adjoining territory, 171, 172
Drilling wells near leased premises, 101, 102
Of leased premises, 109
Protection to oil or premises, 101, 102, 112
Wells near to is not waste, 35
 to protect, 112
- BOUNDARIES OF CITY —**
Extending, right of gas company in new territory, 419
- BRANDS —**
Use of false brands misleading consumers, 670
- BURDEN OF PROOF —**
Plaintiff has in case of negligence, 610
- BURMAH —**
Oil wells, 7

(References are to sections.)

C

- CALIFORNIA —
Oil wells of, 2
- CANADA —
Early oil wells, 2
Gas wells situated in territory, 9
Oil wells, 7
- CANDELABRA —
Fixtures, when are, 568
- CARE —
Leaks and explosions, *see*
Negligence, *see*
- CARS —
Defective, used in transportation of oil, 371, 372
- CASPIAN SEA —
Oil and gas found near, 1, 8
- CÆSAR, JULIUS —
Refers to natural gas spring in France, 8
- CESTUIS QUE TRUSTENT —
When trustee of lessee liable, 213, 214
- CHANDELIER —
Fixtures are, when, 568
- CHARTER —
Is a contract, 391
- CHATTEL REAL —
A lease may be, 51
- CHINA—
Natural gas, 8
Natives used petroleum at early day, 1
- CITY —
Municipality, *see*
- COAL MINES —
Drilling gas well through to lower strata, 369
Laying pipe-line above, support, 368
- COMMERCE —
Gas or oil is an article of commerce, 40
- COMMON CARRIERS —
Negligence in the use of defective cars, 371, 372
Oil shipped on trains carrying other goods, 373
Overcharges for carrying oil, 351
Passengers injured by exploding oil, 375
Shippers liability to servant of carrier, 374
- COMMON LAW —
Rule 566
- COMPOSITION—
Elements of petroleum and natural gas, 11
- CONSIDERATION —
Lease, sufficient amount for, 66
Option must have, 71
- CONSOLIDATION —
Gas companies making must comply with their several grants, 485
- CONSTITUTION —
Limit upon indebtedness of cities, 403, 409
Rates, *see*

(References are to sections.)

CONSTITUTION — Continued.

Regulation of transportation of oil and gas does not prohibit, 350, 352, 353

Restrictions on monopolistic grants, 441, 442, 443

CONSTRUCTION —

Of the provisions of lease, 78, 79, 219

CONSUMER —

Abutting property only entitled to gas, 528

Action against to collect price of gas, 545

Classification of consumers, 543

Common law does not require gas company to furnish gas, 524

Company must supply line consumers with gas, 525

Contract, special for supply of gas may make, 539, 547, 548, 549.

Deposit of money to secure pay for gas, 541

Discriminating between, 526, 527, 542

Distress to collect gas bills, 546

Extension of mains or pipes in order to furnish with gas, 529

Failure to supply with gas, 531

to supply with natural gas, 527.

Former tenant, present tenant not liable to pay his gas bills, 546, 547

Frost preventing company from supplying gas, 534

Gas Company, *see*

Heat, furnishing consumer with gas for, price, 542

Inspection of his premises, 530

Limiting liability for failure to supply gas, 535

Mandamus to compel company to furnish gas, 531, 532

Manufacturer, price of gas to, 526

Meter, *see*

Overcharge, may recover back, 544

Ownership of supply pipe, 550

Payment in advance for gas, 540, 541

Penalties for failure to supply gas, 533, 534

Price in other states to fix price at home, 539, 544

to be charged for gas, 539

Rates, *see*

Receiver of liable for gas bills, 547

Right of consumer to discontinue use of gas, 549

Rules, *see*

must obey, 537

need not obey illegal rules, 537, 538

Shutting off supply for neglect to pay for gas, 547

meaning of in contract, 744

Supply of gas furnished only to abutter, 528

Turning on and off gas, may not, 531

CONTRACT FOR LEASE —

Damages for breach of, 294

Exclusive right to oil or gas, 90

Effect of taking possession of land, under, 292

Indefinite, effect, 290

Interest in land may give, 52

Merged in conveyance of premises, 65

Not often drawn into controversy, 289

Rescission for fraud, 146

Surface of ground, right to oil, 77

Unilateral, what is, 56

What is a sufficient writing concerning, 291

What is a sufficient consideration, 66

(References are to sections.)

- CONTRACT FOR LIGHTING CITY OR TOWN —**
 Action to recover for gas supplied under, 432
 Additional requirements may be exacted in extension of time for completion of gas works, 456
 Assessment of cost of gas upon abutting property, 430
 Assignment of lighting contract, 414
 effect, 94
 Bids for lighting, 411
 Breach of lighting contract by city, 413
 damages, 413
 Changing, city cannot, 417
 Charter to furnish is a contract, 391
 Cost of city light, out of what paid, 426
 Dating ahead, 462
 Discontinuing use of gas, 416
 Exhaustion of light appropriation, no defense, 428
 Extending gas mains, refusing to make, 437
 Extending term of contract, 410
 Federal question, when raises, 451
 Gas furnished without contract, 418
 How executed, 412
 Interest upon gas bills, 433
 Lamps, what kind to be used, 434
 Length of term for light, 409, 461
 Light, *see*
 Mandamus to compel auditing of city bills, 431
 Monopolistic clause in contract does not avoid, 452
 Monopoly, *see*
 Moonlight schedule for light, 422
 Municipal offices interested in, effect, 439
 Municipality, *see*
 New territory, contract covers, 419
 Ordinance, when must be general, 460, 461
 Price to be paid for light, 423, 425
 Rates for gas, *see*
 Receiver bound by, 438
 Rescinding, 413, 415
 Revocation of monopolistic franchise, 447
 Special made for supply of gas at fixed price, 539, 547, 549
 Taxation, exemption from, 425
 Uncertainty, 421
 United States revenue, adding amount to cost of light, 435
 Void, effect of receiving light under, 420, 421
 Waiver as to quality of gas or light furnished, 436
- CONTRACTOR —**
 Gas company may be liable because of his negligence, 605, 681
 Liability for causing leaks in gas mains, 655
- CONVERSION —**
 Oil in tanks or pipe-lines, 46
- CONVEYANCE —**
 Appurtenances, what pass by, 74
 Merges contract for a lease, 65
- CORPORATIONS —**
 For artificial gas, cannot supply natural gas, 478, 742
- CO-OWNER —**
 Co-tenant, *see*
 Partnership, *see*
 Tenants in common, *see*

(References are to sections.)

CO-TENANTS —

Accounting between for oil produced, 278, 279, 282
 Are not partners, 311
 Assignment of lease, 278
 Confidential relations between, 281, 312
 Expense of working joint property, 283
 Fidelity relation between, 288
 Injunction by, when against trespasser, 285
 Joint tenant, *see*
 Jurisdiction of equity to secure accounting between, 282
 Lease may grant of joint property, 275
 License may grant of joint property, 275
 May operate land of co-tenancy, 274
 Partnerships, *see*
 Payment of rent or royalty to one co-tenant, 287
 Purchased by, when of co-tenants' interest, 281
 Receipt of rent or royalties, 287
 Suit to secure an accounting, 278, 279, 282
 Surrender of premises, one tenant may make, 284, 286
 Tenants in common, *see*
 When a tenant is bound by his co-tenants' act, 284
 With owner of mineral, 280

COUNCILMAN —

Interested in lighting contract, effect upon contract, 439

COVENANT —

Assignee of contract, when liable upon, 95
 Breach of implied covenant, effect, 91
 Diligent search for oil or gas implied, 127
 Free gas, agreement concerning is a covenant, 92
 Implied to develop territory, 104
 to operate territory after development, 151
 forfeiture does not authorize, 92, 154, 157
 Personal, what are, 93
 Purchase of tools and machinery, 93
 Running with lands, 92
 Search for oil or gas is implied, 91, 127
 Uncertain, will not work forfeiture, 165
 When implied, 91

CURIOSITY SEEKER —

Injured by explosion of oil, 376

CURTESY —

Husband's right to oil or gas upon premises, 264

D**DAMAGES —**

Acquiescing in abandonment of lease, effect, 132
 Breach of contract to give a lease, 294
 to furnish light, 413, 415
 Compliance with terms of lease, 183
 Duty of owner of premises to prevent, 592
 Entire leased premises must be developed, 104 to 107
 Failure to develop premises, 104, 180
 to deliver lessor his share of oil, 231
 to supply gas, 533, 534
 Injunction to prevent cutting off supply of gas, 548
 Instead of forfeiture, 192
 Limiting liability for neglect to supply gas, 535

(References are to sections.)

- DAMAGES** — Continued.
 Measure of for taking oil or gas illegally, 33, 108
 for taking right of way for pipe-line, 361 to 364
 Neglect of company must cause damage to render it liable, 604
 Occasioned by storing or bringing oil on land, 584
 Res judicate, 107
 Sickness occasioned by small supply of gas, 534
- DEAD SEA** —
 Oil found upon its boundaries, 1
- DEBT** —
 Constitutional provisions concerning, 408, 409
 Contract for light does not create, 408, 409
 Liability of parties for debts of mining partnership, 324, 325
- DEED** —
 Conveyance, *see*
 Quit claim deed may create a lease, 62
- DESCRIPTION** —
 Sufficiency of in an oil lease or contract, 76
- DILIGENCE** —
 Agreement concerning what shall be, 98
 Forfeiture of lease, *see*
 Greater required in developing oil than coal lands, 130
 Implied covenant to search for oil or gas, 127
 Lease, *see*
 Operating premises, degree required, 97
 When work on leased premises must begin, 96
- DISCRIMINATIONS** —
 Failure of supply of natural gas does not authorize, 527
 Gas company cannot make, 526, 527, 542
 In care of meters, 563
- DISTRESS** —
 To collect gas rents, 546
- DOWER** —
 Assignment in mineral lands, 273
 Right of widow to operate wells upon lands assigned to her, 261, 262
 273
- DRAKE, E. L.**
 Dug first oil well, 5
- E**
- EAST LIVERPOOL** —
 Gas wells, 9
- EJECTMENT** —
 Lessee may maintain to recover leased premises, 20
- ELECTION** —
 To authorize city to purchase or build a gas plant, 517
- ELECTROLYSIS** —
 Expert evidence to show effect of, 659
- EMINENT DOMAIN** —
 Artificial gas companies, power to use, 357
 Condemning right of way for pipe lines, 503
 Conferring power of on gas or oil companies, 356-358
 Foreign corporations empowered with right to use, 357, 358
 Measure of damages in taking right of way for pipe lines, 361 to 364
 Petition to condemn pipe line right of way, 367

(References are to sections.)

ENGLAND —

- Natural gas wells, 8, 9
- Oil wells, 7
- Refining petroleum, 13

ESTOPPEL —

- City, when may be to control validity of monopolistic grant, 450
- Land owner, to remove pipes from highway, 504
- Occupying streets under void ordinance, 479
- When lessor may be estopped, 182
- When lessee may be estopped, 84

EXCEPTION —

- Consideration for grant of a part of mineral, 245
- Distinction between an exception and reservation, 302
- Reservation, *see*
- Severance of mineral by means of, 303
- Subject to liens of judgment, 307

EXCLUSIVE CONTRACT —

- Monopoly, *see*

EXPENSES —

- Operating expense first paid, when, 224, 225
- Recovery when there has been an abandonment or forfeiture, 137
- Reimbursement of lessee for expenses, 190

EXPLOSIONS —

- Insurance cases, 697, 698
- Leaks and explosions, *see*
- Prospective damages occasioned by pipe lines, 363

EVICITION —

- Effect upon lease, 120, 161
- Erection of building for machinery is not, 120
- Relieves lessee from liability to lessor, 241

EVIDENCE —

- Care on part of gas company to prevent leaks, 658
- Expert, to show effect of electrolysis, 659
- Inhalation of gas, 660, 661
- Leaks and explosions, *see*
- Notice of leaks in gas main, 620, 621, 622
- Presumption of negligence arising from proof of explosions, 611, 612
- Undue pressure in gas pipes at other places, 632

F**FIRE-POT —**

- Injury occasioned by exploding gasoline firepot, 669

FIRES —

- Negligence, *see*
- Pipe line occasioning, 363

FIRST OIL WELL —

- When dug, 5

FIXTURES —

- Agreement concerning may make them personal property, 567
- Between mortgagor and mortgagee, 571
- Candelabra, 568
- Chandeliers, 568
- Coal and mineral lease fixtures, 575
- Conveyance of premises, effect on fixtures, 577
- Division of subject, 565
- Gas burners, 570

(References are to sections.)

FIXTURES — Continued.

- Gas generators, 570
- Gas machine, 570
- Gas stoves, 568
- Gasoliers, 568
- Injury to freehold by removal, 567
- Innocent purchaser of premises, rights, 567
- Intent to constitute, when essential, 566
- Judicial sale of premises, effect upon, 569
- Landlord and tenant or between, 573
- Mixers, 568
- Mortgaging, 577
- Oil and gas lease fixtures, 576
- Pipes in house for gas, 570, 572, 573
- Pipe lines, 579
- Public policy, 560
- Removal after forfeiture of lease, 191
- Sources, 568
- Special contract controls, 578
- Trade fixtures, 573, 574
- Vendee, when entitled to, 570

FLAMBEAU BURNERS —

- Prohibiting use, 28, 386

FOREIGN CORPORATION —

- Right to exercise powers of eminent domain, 357, 358

FORFEITURE —

- Action to declare forfeiture of right to occupy streets, 491
- Monopolistic contract for lighting city, 452, 454
- Right to occupy streets, 490, 491
- Waiver by city of right to declare a forfeiture, 492

FORFEITURE OF LEASE —

- Abandonment, *see*
- Acquiescence in delay in developing premises, 131
- Actual mining operations must commence within a reasonable time, 133
- Assignee of lessor may declare forfeiture, 152
 - of lessee cannot take advantage of forfeiture clause, 195
- Breach of implied covenant, 91
- Cessure of work after operations begin, 141
- Clause concerning omitted, effect, 156
- Covenant uncertain, effect, 165
- Damages for failure to develop premises, 104 to 107
 - for non-compliance with terms of lease, 183
 - instead of declaring a forfeiture, 192
- Declaration of forfeiture by lessor, notice, 158
- Diligence, agreement as to what constitutes, 98
 - in beginning work, 96
 - in operating premises after forfeiture, 97
 - required in developing oil lands, 130
 - search for oil required, 137
- Draining leased lands by wells on adjoining premises, 171, 172
- Excavating for oil means bringing it to surface, 176
- Expense of drilling wells, recovery, 137
- Extension of time of lease, 131, 140
- Failure to operate and not failure to develop, 162, 163
- Favorite equity when will promote justice, 147, 148, 151
- Fixtures, *see*
 - and machinery, removal, 191
 - when forfeited, 574

(References are to sections.)

FORFEITURE OF LEASE—Continued.

- Heirs may declare, 152
- History of change of rule giving lessor exclusive right to declare, 149
- Holding premises for speculative purpose, not permitted, 128
- How may be declared, 237, 238
- Implied covenants to operate premises, 151
 - do not authorize forfeiture, 154, 157
- Inability to complete work, effect, 173
- Lessee cannot insist upon, 153, 155
 - cannot recover premises after forfeiture incurred, 189
- Lessor can only declare, 148, 149, 151
- Liability for rent after forfeiture incurred, 237 to 240
- Lien, effect upon premises, 334
- Machinery, removal, 191
- Mortgage of leasehold may work, 174
- Non-development of premises where no time is fixed, 129
- Notice of election to declare, 153
- Part only of leased premises, 169, 170, 189
 - of premises, 111, 112
- Paying quantities, *see*
 - what is considered to be, 134, 135, 136
- Payment of rent, when will prevent, 145
 - when will not prevent, 178
- Production of gas will not prevent forfeiture of an oil lease, 164
- Question of intention, 184
 - for jury, 185
- Re-entry, when necessary, 166
- Reimbursement of lessee for expenses incurred, 190
- Relief from, 187
- Royalty, failure to pay, effect, 177
- Rule in gas or oil leases, 148
- Stranger cannot avail himself of a forfeiture, 153
- Suit to cancel lease, 186
- Surface, oil must be brought to, 176
- Surrender after assignment, 168
- Time to avoid, 188
- Waiver of, 159, 160
- Wells, *see*
 - must be drilled to prevent, 111, 112, 175
- Work, when must be completed, 175
- Unavoidable accident, effect, 131
- Void, in lease, means voidable,

FORMS OF LEASES—

See Appendix

FRANCE—

Natural gas and oil wells, 7, 8

FRANCHISE—

- Acceptance of necessary, 471
- Assignment of, rates for gas fixed in assignment, 395
- Change of use, cannot be made, 478
- Consolidation of gas company, effect, 485
- Construction, 472, 473, 478
- Estoppel to contract, 479
- Forfeiture, exclusive franchise, 454
 - of right to occupy streets, 491
 - waiver of right of city to declare, 492
- Grant of right to occupy street before company is organized, 482
- Length of grant, 483
- Monopoly, *see*

(References are to sections.)

FRANCHISE — Continued.

- Nature of discussed, 469, 470
- Natural gas grant does not authorize the use of artificial gas, 478, 742
- New territory, 474, 475, 476
- Ordinance, *see*
- Power to grant not property of city, 467
- Revocation of monopolistic contract, 447
 - when may be made, 489
- Strictly construed, 472, 473, 474
- Taxing, 731
- Termination of life of corporation before expiration of right to occupy streets, 484
- Town becoming a city, effect upon gas company, 486
- Void ordinance, effect upon franchise, 479
- What territory it extends to, 474, 475, 476

FRAUD —

- Avoids contract for a lease, 146
- Co-tenant's fraud upon fellow tenant, 281, 288
- Fidelity relations between co-tenants, violating, 288
- Municipal offices interested in city contract, effect, 439
- Partner's fraud upon co-partners, 288, 312, 315

FREDONIA —

- Gas wells, 9

FREE GAS —

- City contract for, 424
- Covenant for runs with leased premises, 92
- Quantity lessor entitled to receive, 226, 547
- Royalty in gas used to operate leased premises, 227
- When part of rent, 225, 226

FRENCH —

- Discovered oil in Pennsylvania at early date, 2

FROST —

- Breaking pipes and occasioning leaks, 624
- Entering pipes, no defense for failure to furnish gas, 534

G**GALICIA** —

- Oil wells, 1, 7

GAS —

- Artificial and natural gas not subject to same statutes, 455, 742
- City may furnish for commercial purposes, 512, 513, 515
- Company, prices it may charge for gas, 539
- Consumer, *see*
 - may discontinue use of gas, 549
- Dangerous substance, care required in handling, 600 to 602
- Delivery to consumer, when completed, 559
- Deposit of money to secure payment for, 541
- Discontinuing use of by city, 416
- Early attempts to use for light, 17
- Heat, price to be paid for gas, 542
- Inhalation, evidence to show, 660, 661
- License, 743
- Mandamus to compel company to furnish, 531, 532
- Measuring, 557, 558
 - by officially tested meters, 557
- Meters, *see*
- Municipality, profit may make in furnishing its customers, 515

(References are to sections.)

GAS — Continued.

- Natural gas, *see*
 - same statutes do not apply to, 478
- Necessary of life, is not, 748
- No contract for gas furnished, 418
- Payment for, in defense to suit on account, 540, 541
- Poor quality, rescission of contract for gas, 415
- Pressure in pipes, regulating, 363
- Price to be charged, 539
- Shutting off supply for failure to furnish gas, 547
 - meaning as used in contract, 744
- Taxing, 741
- Turning off and on, who may, 531
- Waiver as to quality of gas furnished for light, 436

GAS BOX —

- May be placed in streets, 498
- Use of in sidewalk occasioning injury, 680

GAS BURNERS —

- Are fixtures, 570

GAS COMPANY IN CITIES AND TOWNS —

- Accepting provisions of subsequent ordinance,
 - effect upon rates, 396
- Assignment of franchise, effect upon rates, 395
- Conditions of grant, must perform, 472
- Consolidation, effect, 485
- Consumer, *see*
 - must be furnished gas, 525
- Duty to protect the public and its patrons, 599
- Franchise, acceptance of necessary, 471
 - nature of, 469, 470
- Grant to occupy streets strictly construed, 473
- Leaks and explosions, *see*
- Natural gas company cannot be organized under artificial gas statutes,
 - 455, 742
- Quasi public corporations, 401
- Rates for gas, *see*
- Regulations of by municipality, 399, 480
- Streets, *see*
- Supplies furnished to, liable, 747
- Taxing, 741
- Unlawful combinations, may not make, 459

GAS FITTER —

- Liable for occasioning explosion, 657
- Plumber, *see*

GAS GOVERNOR —

- Injunction to restrain use of, 553

GAS MAINS —

- Extension, when company must make, 437
- Natural gas mains using for artificial gas, 478, 742
- Not an additional burden on fee, 500
- Ordinance necessary to authorize placing in street, 460
- Pipes, *see*
- Taxed as personal property, 730

GAS POSTS —

- Leaving in street after franchise has ended, 499

(References are to sections.)

GAS WORKS —

- Building under void grant or franchise, 457
- City's gas plant, 733
 - how pay for, 430
- Enjoining construction, 595
- Extension of time to complete, 456
- How city may pay for, 430
- Imperfectly constructed, occasioning injury, 683
- Lease of its plant by city, 522
- Mortgaging, 348
 - cannot be mortgaged, 339
- Municipality may own, 511, 512, 513
 - may take stock in private company, 518
 - must be sole proprietor, 518
- Nuisance, *see*
- Option of city to purchase, 458
- Polluting well or spring near by, 581
- Right of city to purchase of gas company, 519
- Sale by city of its plant, 521
- Taxing, 733
- Trustee to operate city's plant, 520

GASOLIERS —

- Fixtures are, when, 568

GASOLINE —

- Fire pot for exploding, 669
- Leaks and explosions, *see*
- Oil, *see*

GERMANY —

- Oil wells, 7

GOVERNMENT LANDS —

- Entry of government oil lands, 45

GRASS —

- Proof of effect of escaping gas on growing grass, 662

GREEK FIRE —

- Used by ancients, 1

GUARDIAN —

- Leasing ward's property, 57, 256
- When may not drill for gas, 35

GUEST —

- May recover damages from gas company, 641

H**HAWAIIAN ISLANDS —**

- Oil wells, 7

HEAT —

- Natural gas company cannot be organized under statute for formation of heating companies, 39
- Price to be paid for gas for heating when price of gas for light is fixed, 542

HEIR —

- Interest of in gas lease, 57
- May declare forfeiture, 152
- Rights in mining partnership, 315

HERODOTUS —

- Speaks of petroleum, 1

(References are to sections.)

HIGHWAYS —

- Acquiescence in use of for pipes, 504
- Condemnation of right of way in for pipes, 503
- Consent of city to lay pipes in, when not necessary, 468
 - of county to lay pipes in, 506
- Control of, 464
- Crossing with pipe-line, 506
- Defined, 463
- Franchise to occupy discussed, 469, 470
- Injuries occasioned by laying mains therein, 682
- Natural gas beneath, who owns, 306
- Oil beneath, who owns, 306
- Pipes laid in an additional burden on fee, 502
- Removal of pipes from unlawfully laid therein, 508, 509
- Revocation of license to use for pipes, 507
- Streets, *see*
- Surface cannot be used for pipes, 510
- Use of for private purposes, 465
 - for pipe-lines, 360

HISTORY —

- Ancients knew of petroleum, 1
- Early wells in America, 2 to 6

HOMESTEAD —

- Husband may lease, 62
- Wife must sign lease, 57

I

INDEBTEDNESS —

- City's contract for light does not create, 408, 409

INCOME —

- Defined, 224

INCORPOREAL HEREDITAMENTS —

- License to drill for oil may be, 50, 63

INDIA —

- Oil wells, 7

INDICTMENT —

- Obstructing streets, 494
- Waste of natural gas or oil, 598

INFANT —

- Lease of oil or gas land cannot make, 256

INFLAMMABLE OILS —

- Judicial notice concerning, 41

INGRESS AND EGRESS —

- Right to have, 74

INJUNCTION —

- Building of gas plant, preventing, 595
- Gas governor, to compel removal, 553
- Lessee entitled to protect leased premises, 103
- Mandatory to compel turning on of gas, 548
- Nuisance, restraining, 594, 595
- Ordinance, to prevent passage by city council, 453
- Pipes, protecting, 496
- Preventing the cutting off of gas, 548
- Protecting right to use streets, 481
- Restricting the laying of pipes in street, 487
- Waste of natural gas, preventing, 28, 35, 598

(References are to sections.)

INSPECTION —

- Company may inspect premises furnished with gas, 530, 615
- Pipes must be inspected by gas company, 615
- Right of company to make of premises, 590, 615
- State may require of oil, 388

INSPECTOR —

- State inspector of gas, *see Taxes*

INSURANCE —

- Benzine and burning or chemical oil, 694
- Cleaning clothes with gasoline, effect on insurance policy, 718
- Conflict between rider or written part and printed part of rider, 689
- Contiguous buildings, what are, 690
- Custom may control terms of policy, 706
- Damages, right of company to recover, 724
- Death caused by inhaling gas, 726
- Destroying vermin in house with gasoline, 718
- Drug store keeping explosive oils, 713
- Exemption clause omitted, 697
- Explosions, 697, 698
- Extent of prohibited use, 702
- Factory using gasoline, 712, 716
- Failure to disclose the use of oil, 699
- French electric fluid equivalent to benzine, 694
- Furniture store using oil for cleaning, 711
- Gas company causing fire liable to insurance company, 725
- Grocery keeping oil for sale, 709
- Hazard not increased, policy avoided, 700
- Hazardous articles, occasional use, 703
- Implied consent to make use of prohibited articles, 706
- Increase of risk, 704
- Inhaling gas covered by accident or life policy, 726
- Judicial notice of nature of oils, 41
- Keeping oil, meaning of term, 707
- Kerosene oil, when use of prohibited, 694
 - use of for fires, 695
- Lamps, filling in day time, 694
 - failure to extinguish, 693
 - time to extinguish, 692
- Laundry using gasoline, 714
- Lights, oil used for, 706
- Lubricating oils, keeping, 694, 719
- Machinery, keeping oil for, effect on policy, 694, 719
- Oil for illumination, 691
 - upon premises, 694
- Owner of premises must violate terms of policy to avoid it, 696
- Paint shop using oils and benzine, 711, 716
- Painter keeping oils and using them, 716, 717
- Patent leather factory using gasoline, 715
- Powder exploding and causing damages, 697
- Prohibited use not occasioning loss, 695
- Premises, what constitutes, 689
- Proof of custom of the usual practice, 705
- Release by the insured of person causing loss, 724
- Risk increased, effect, 704
- Rope factory using oil on premises, 712, 716
- Store keeping oil for sale, 708
- "Storing" meaning of term, 707
- Tenant violating provisions of policy, 696
- Torch, using to remove paint from building, 717

(References are to sections.)

INSURANCE — Continued.

- Use of oil allowed, 701
- Wagon-shop using oil, 711
- Waiver of illegal use of building, 720, 721
 - acquiescing in prohibited use of building, 721
 - adjusting loss or accepting proof without objection, 723
 - receiving proof with knowledge of prohibited use, 722
- Watch-maker using oil, 710, 712
- Warranty as to conditions of store, 700
- Written part controls printed parts, 688

INTEREST —

- On over-due gas bills, 433
- On royalties and rents, 232

INTER-STATE COMMERCE —

- Overcharges by carriers of oil, 351
- Transportation of oil or natural gas, 350, 351, 352, 353, 384

IONIAN ISLANDS —

- Oil wells, 1, 7

ITALY —

- Natural gas wells, 8
- Oil wells, 7

J

JAPAN —

- Natural gas, 8
- Oil wells, 7

JESUITS —

- Refer to oil springs in America, 2

JOINT LEASE —

- By separate land-owners, 86

JOINT TENANCY —

- Illustrations of in mining enterprises, 317

JOINT TENANTS —

- Are not partners, 312
- Co-tenants, *see*
- Payment of rents or royalties to, 230

JUDGMENT —

- Lien on exception or reservation, 307

JUDICIAL NOTICE —

- Burning fluid, 41
- Chemical oil, 41
- Concerning operation of oil wells, 42
- Courts take of properties of oil and gas, 41, 42, 382
- Taken of dangerous properties of gas, 382

JUDICIAL SALE —

- Transfer of lease by sale, 199

JURY —

- Contributory negligence a question for it, 652
- Forfeiture a question for it, 184, 185
- Questions for, in cases of negligence, 652

K

KALM. PETER —

- Describes oil wells in Ohio and Pennsylvania, 2

(References are to sections.)

KENTUCKY —

Early oil springs, 2

KENYON COLLEGE —

Gas wells, 9

KEROSENE —

Judicial notice concerning, 41

KIES, SAMUEL M. —

Sold petroleum as a medicine, 14

L

LAKE —

Ownership of oil and gas beneath, 306

LAMPS —

Extinguishing pursuant to provision in insurance policy, 692, 693

What kind to be used under gas contract, 434

LAMP-POSTS —

Defined, 434

Removal, 434

LANDLORD AND TENANT —

Contributory negligence of tenant, 654

Fixtures, who entitled to, 573

Right of action against tenant for damages occasioned by gas explosion,
645Tenant, *see***LARCENY —**

Gas a subject of theft, 743

Oil in earth, 26

Oil in tanks or pipe-line, 46

LEAKS AND EXPLOSIONS —

Available force of gas company to prevent leaks, 616

Breaking of pipes for lack of support, 625

occasioned by ordinary use of streets, 623

Burden to show negligence of company, 610

Care on part of gas company, evidence to show, 658

required of company to prevent, 599, 600

Child, negligence of its parents may defeat its cause of action, 653

Company misleading plaintiff as to the extent of danger, 627

Concerning negligence of two or more defendants, 605

Contractor's negligence, 655

Contributory negligence of plaintiff defeats his cause of action, 648

question for jury, 652

Control of gas, company must maintain, 601

Cutting off supply of gas to prevent injury, duty of property owner
to make, 650

Deception used in sale of dangerous oil, 678

Defective barrels used in shipping oil, 374

Degree of care required of gas company, 602

Duty of gas company to prevent leaks, 599

to make immediate repairs, 616

Evidence in cases of inhaling gas, 660

to show due care on gas company's part, 658

to show other leaks, 621

of leaks, 622

of undue pressure in pipes at other places, 632

of notice to gas company of danger to mains, 626

to show effect upon growing vegetation, 662

Excavation near pipe-line causing leaks, 625

Expert evidence to show effect of electrolysis, 659

(References are to sections.)

LEAKS AND EXPLOSIONS — Continued.

- Exploding tank injuring servant, 684
- Explosion occasioned by violation of statute, 607
- Failure of company to discover place of leakage, 613
- Frost occasioning leak, 624
- Gas-fitter igniting escaping gas, liability of gas company, 638
liability, 657
- Gas following supply pipe from main, 629
 - following sewer, 629
 - percolating through soil, 629
 - turned on by owner or stranger, 644
- Guest of family may recover damages of gas company, 641
- Implied warranty in sale of illuminating oil, 679
- Inhalation of gas, 660, 661
- Insurance, *see*
- Inspection of premises to prevent leaks, 530
 - to detect leaks, 615
- Inspector, gas company must employ, 637
- Intervening agency, 614
- Landlord's right of action against tenant, 645
- Laying gas mains on bed of navigable river, 608
- Lessee's negligence, 655
- Municipality liable for damages occasioned by it in operating plant, 628
- Neglect of gas company must cause damage to render it liable, 604, 606
- Negligence in turning off gas, 644
- Negligently permitting oil to escape upon ground, 671
- Negligent parent, wife or servant, 653
- Night watchman, must be maintained to detect leaks, 603
- Notice of leaks, duty of company, 617, 618
 - when not necessary to fix gas company's liability, 619
- Oil exploding on trains, 375, 376
 - escaping from refinery and exploding, 672
- Overwhelming disaster, liability of gas company, 609
- Owner of premises, when liable to injured person, 647
- Person on premises by license may recover damages, 640
- Plaintiff must show due care on his part, 648
- Pressure of gas, undue, effect, 604
- Presumption of negligence owing from proof of explosion, 611, 612
- Property owner's duty to notify gas company of leak, 626
- Question of negligence, when for jury, 663
- Removal from premises to escape personal injury, 649
- Repairing consumer's pipes or fixtures, gas company undertaking to make, 634
- Rescuer injured by negligence of oil or gas company, 673
- Reversioner's right to recover damages, 654
- Sale of oil below fire test, 678
 - in violation of statute, followed by explosion, 677, 679
- Searching for leaks with lighted candle, 651
- Servant of gas company causing explosion, 633
 - of oil company injured by defective appliances, 670
- Sewer gas driven into house by escaping illuminating gas, 636
- Shade trees injured by escaping gas, 635
- Shrubbery injured by escaping gas, 635
- Shutting off gas and depriving city of light, 609
- Stop-cock on street line, who may open, 613
- Stranger turning on gas, 644
- Tenant's right of action against landlord, 646
 - contributory negligence may bar his landlord's right of action, 654

(References are to sections.)

LEAKS AND EXPLOSIONS — Continued.

- Third person causing explosion, 637, 638, 643
- Undue pressure in gas-mains causing leak, 631
- Withdrawal of gas from mains without notice, 630

LEASE OF OIL OR GAS LANDS —

- Acceptance necessary, 84
- Acknowledgment of defective, 82
- Administrator, power to execute, 60
- Agent of lessee, when may take lease, 89
- Assignment of lease, *see*
- Assignee bound by terms of lease, 203
 - having a prior lease, 69
- Blanks in unfilled, effect, 80
- Boundaries of, how determined, 109
- Cancellation by suit for failure to develop, 186
- Change of by parol agreement, 83
- Chattel real, may be, 51
- Conditional oil or gas lease, 53, 54
- Consideration, 78, 79
 - by court, 48
 - may be purchase money, 245
 - what is sufficient, 66
- Construction, 48, 219
- Co-tenant, 275
- Contract for not many, 289
 - damages for breach of, 294
 - giving interest in real estate, 52
 - indefinite, 291
 - specific performance, 293
 - what is sufficient for lease, 291
- Damages for failure to develop premises, 104 to 106
 - measure for taking oil or gas illegally, 108
- Default in developing lessee cannot take advantage of, 237, 238
- Denial of tenancy, effect, 122
- Description of premises leased, 70
- Development, 104 to 107
- Diligence required of lessee, 54
 - in beginning work, 96
 - in operating premises after development, 97
- Duration of lease, 91
 - of ordinary lease, 126
- Ejectment in favor of lessee, 120
- Entire premises must be developed, 104 to 106
- Estoppel, when lessee estopped, 84
- Eviction of lessee terminates, 120, 161
- Exclusive right of lessee to oil or gas, 57, 90
- Excuse for not drilling test wells, 113
- Execution of defective, 82
 - how must be made, 81
- Extent of territory covered by, 77
- Extension of time may amount to a new lease, 70
- Father cannot make a lease of child's lands, 256
- First oil lease executed in America, 16
- Fixtures, *see*
 - removal from premises, 575 to 579
- Forfeiture by breach of implied covenant, 91
 - by mortgage of leasehold premises, 174
 - lessee cannot insist upon, 155
- Forms, appendix, *see*

(References are to sections.)

LEASE OF OIL OR GAS LANDS — Continued.

- Free gas granted by is a covenant, 92
- Guardian leasing ward's premises, 256
- Holding for speculative purposes, 128
- Homestead, how leased, 57, 62, 258
 - power of husband to lease, 62
- How to execute, 255 to 258
- Impairing value of by lessor, 100
 - value of, 100
 - value of by operating on adjoining territory, 101
- Implied covenant to develop, 91
 - covenant to search for oil or gas, 127
- Incorporeal hereditament, when is, 50
- Infant cannot make, 256
- Ingress and egress to leased premises, 74
- Injunction to protect rights of lessee, 103
- Interest of lessee in various leases, 57
- Joint, given by separate owners, 86
- Lessee's right of action against gas company, 642
- Lex loci controls, 49
- License, when is, 50
 - when is not, 61
- Life tenant giving, 256
- Limitations, 256
- Married woman, 257
- Merger in fee, 65
- Mortgaging, 341 to 347
- Natural gas, lessee not entitled to under oil lease, 118, 119
- New lease may become, 73
 - effect upon rent or royalty, 236
- Non-development of premises where no limit is fixed, 129
- Notice of former lease, 69, 88
 - of former license, 62
 - to one of several lessees sufficient, 87
- Oil lease does not give title to gas, 118, 119
- Operations under, when must begin, 96
- Option, revocation, 17, 72
 - to extend term, 68
 - to pay rent or drill well, 73
 - to purchase after development, 67
- Oral change discharging or changing rents, 247
- Owner of land may grant a lease, 255
- Partition of mineral lands, 276, 277
- Parol, change of written lease by parol agreement, 83
- Parol lease is only a license, 62
- Paying quantities, *see*
 - as used in a lease, 134, 135, 136
- Peculiarities of oil leases, 47
- Personal covenants in, what are, 93
- Possession of premises, lessee cannot recover after forfeiture incurred, 189
- Printed form as evidence, 84
- Protecting boundaries of lease, 112
- Quieting title to in lessee, 103
- Receiver, *see*
 - when will be appointed, 300
- Rescission for fraud, 146
- Reimbursing lessee for expenses, 190
 - when title fails, 121

(References are to sections.)

LEASE OF OIL OR GAS LANDS — Continued.

- Release of lessee by substitution of assignee, 212
- Rents, lessee must pay, 180
- Royalties, *see*
- Sale of oil and gas, and not a lease, 58
- Second supersedes first, 69
- Signing by lessee not necessary, 85
- Statute of Frauds, concerning, 75, 291
- Substitution of tenants, effect, 143
- Surface, right of lessee to use, 77
- Taxing, 741
- Tenants for life, 261 to 273
 - from year to year, 259, 260
 - from year to year, lease exists, 55
 - from year to year or at will, 55
- Termination by failure to keep terms of lease, 237
 - when occurs, 91
- Territory covered by lease, 77, 78
- Test well, *see*
 - depth, 113, 115
- Texas lease, consideration, 56
- Title to oil or gas, where rests, 34, 53, 54
- Trustee of lessee is not a cestui quo trustent, 212, 214
- Uncertainty, effect upon unconscionable contract, 123
- Unilateral, may be, 56
- Unprofitable, how determined, 99
 - may be abandoned, 99
 - what is, 99
- Waste as between lessees, 35
- Wells, *see*
 - contract to drill in vicinity, 125
 - diameter, 124
 - depth, 115
 - location upon premises, 109, 110
 - locating on strangers' land by mistake, 116
 - number to be drilled, 111
 - selection of site for, 109, 110
 - shooting, 117
 - shooting, when may be prohibited, 117
 - when need not be drilled, 114
- Wife should join in husband's lease, 258
- Written and printed clause is conflicting, 80

LEASE OF GAS WORKS —

- City may lease its gas works to private company, 522

LEASEHOLD —

- Fixtures situated upon, 575 to 579

LEGISLATURE —

- Flambeau lights may prohibit, 28, 386
- Inspection of oil may require, 387
- Monopoly, *see*
- Monopolistic contracts may authorize, 441, 442, 443
- Plugging wells, may require, 43
- Power to prevent waste of natural gas, 28
 - to regulate use of gas and oil, 25
 - to control production of gas, 382
 - to authorize monopolistic grants, 449
- Public safety may protect, 382
- Pumping gas, may regulate, 29
- Rates for gas, when may change, 400 to 403

(References are to sections.)

LEGISLATURE — Continued.

- Revocation of monopolistic contracts, 447
- Transportation of oil and gas, limiting, 40
- Use of the word "lease" does not make instrument a lease, 48
- Waste of natural gas may prevent, 385, 386, 387
- Wells near boundary line of lease, regulating, 102
- May require them to be plugged, 385

LESSEE —

- Co-lessee purchasing leased lands, 65
- Default in lease, cannot take advantage of, 237, 238
- Denying tenancy, effect, 122
- Diligence required of to develop leased premises, 54
- Drainage leased premises by operations on adjoining territory, 101
- Ejectment may maintain for premises, 120
- Eviction, effect, 161
- Forfeiture, cannot insist upon, 155, 238, 239
- Lease, *see*
- Liability for leaks in gas mains, 655
- Rents must pay, 180
- Right of action against gas company, 642
- Signing lease, need not do, 85
- Tax must pay, when, 741

LESSOR —

- Forfeiture, *see*
- Lease, *see*
- Taxes, when must pay, 741
- When estopped, 182

LEX LOCI —

- Law of governs provisions of lease, 49

LICENSE —

- Co-tenant may give, 275
- Definition of, and illustrations, 62
- Dissolution of partnership revokes, 64
- Exclusive license to take oil or gas, 90
- Grant to occupy streets with gas mains, 489
- Illustrations, 57
- Interest in land, when creates, 62
- Lease when not a license, 31
- Notice of prior lease, 62
- Parol, 62
- Personal privilege, when is, 62
- Quit claim deed may create, 62
- Revoking right to lay pipe-line, 366
 - when cannot be done, 63, 64
- When creates an incorporeal hereditament, 50

LIEN —

- Judgment is a lien on a reservation or exception, 307
- Mechanics' Lien, *see*
- Partner's, for money advanced, 323
- Royalty is upon assets in hands of receiver, 253

LIFE-TENANT —

- Accounting, rule as to, 279
- Estoppel of remainderman, 272
- Exhausting oil or gas, 271
- Lease may make, 250
- New wells may not drill, 263
- Reversioner or remainderman opening wells, 267
- Title to oil illegally severed from premises, 269, 270

(References are to sections.)

LIFE-TENANT — Continued.

Waste must account for, 268
 When may drill well, 265

LIGHT —

Early use of gas for lighting, 17

LIGHTING CONTRACTS —

Action to recover for gas supplied, 432
 Appropriation for, when necessary to render contract valid, 427
 Assessing costs upon abutting property, 430
 Assigning lighting contract, 414
 Bids for lighting, 411
 Contract, *see*
 city cannot change, 417
 Cost of, out of what fund paid, 426
 Dating contract ahead, 462
 Discontinuing use of gas, 416
 Exempting gas company from taxation, 425
 Extension of gas mains, refusing to make, 437
 Extending term of contract, 410
 Free light, 424
 Furnishing to city without contract, 418
 How executed, 412
 Indebtedness for, constitutional limit upon, 408, 409
 Interest on over-due gas bills, 433
 Lamps, kind to be used, 434
 Length of term of contract, 409, 461
 Mandamus to compel auditing of light bills, 431
 Monopoly, *see*
 Moonlight schedule, 422
 Municipality, *see*
 New territory, contract covers, 419
 Offices of city interested in contract, effect, 439
 Power of city to contract for light, 407
 Price to be paid for gas, 423, 425
 Rates, *see*
 Receiver bound to furnish, 438
 Rescission of contract for gas, 413, 415
 Term for light, for how long it may be made, 409, 461
 United States revenue added to cost of gas, 435
 Void contract for gas, effect of receiving gas under, 420
 Waiver of quality of gas, 436

LOSS —

Implied covenant to work wells at a loss, 91

LUNATIC —

Cannot execute a lease on his lands, 256

M**MACHINERY** —

Fixtures, *see*
 Removal after forfeiture of lease, 191

MALICE —

Element of damage in boring well, 32

MANDAMUS —

Auditing gas bills, to secure, 431
 Insufficient quantity of natural gas, no defense, 531
 Payment of bills, to compel, 431
 Permit to occupy street, to secure, 480
 Subscribing to illegal rules and regulations, 538
 To secure supply of gas, 531, 532, 538

(References are to sections.)

MARCO POLO —

Refers to natural gas, 8

MARRIED WOMAN —

Interest in reservation, 308

Should join her husband in lease of his lands, 258

When may lease her lands, 257

MAYOR —

Interest in city contract for light, 439

MECHANIC'S LIENS —

Assignment of claims carries, 338

Attorney fees covered by assignment of claims, 338

Contract necessary to establish, 328

Custodian entitled to, 331

Derrick, lien for building, 330

Description of land in notice, 337

Foreman entitled to take, 331

Forfeiture of lease, effect, 334

For what labor a lien may be obtained, 330

For what material furnished a lien may be obtained, 329

Labor or material must be furnished under a contract, 328

Lubricating oil furnished for machinery, 327

Machinery for leased premises, 329

Notice of claim of lien, 337

Oil refinery subject to, 334

On plant of public gas company, 339

Overseer entitled to, 331

Paraffine works subject to, 340

Pipe furnished for well, 329

hauling for use in well, 330

Priority of liens, 336

Retroactive effect of mechanic lien laws, 335

Superintendent entitled to, 331

Tools furnished mine, 329

Upon what interest it may be taken, 332

Well, drilling, gives, 333

MEDICINE —

Barbadoes Tar, 14

Petroleum used as, 14

MERGER —

When license merged in fee, 65

METER —

Action to secure inspection, 555

Charging rent for unless a certain quantity of gas is used, 562

Consumer, *see*

Control, 553

Defined, 551

Delivery of gas, complete when has passed meter, 559

Discrimination in use, 563

Extra charge for, 561

Fixtures, when meters are, 563

Governor to control supply of gas, 553

Inspection by company, 555

official, 556

official when measurements conclusive, 557

Measurements of quantity of gas used, 558

officially tested meters, 557

Number company must furnish, 552

Officially tested meters conclusive in their measurements, 557

(References are to sections.)

METER — Continued.

- Removal, 564
- Rent for may be charged, 562, 564
- Rules and regulations concerning, 560
- Taxing, 556
- Testing, 556
- Unreasonable requirements, 554
- Who must furnish, 552

MEXICO —

- Oil wells, 7

MINERALS —

- Natural gas is a mineral, 29
- Oil is a mineral, 29, 304
- Reservation of, includes oil and gas, 304
- Taxing, 741

MIXER —

- Defined, 221, 551
- Extra charge for, 561
- Unreasonable requirements concerning, 554
- Who must furnish, 552

MOLDAVIA —

- Oil wells, 1, 7

MONOPOLY —

- Construction of exclusive grants, 446
- Dating lighting contract ahead, 462
- Division of subject, 440
- Estoppel to contract, 450
- Exclusive franchise strictly construed, 446
 - for artificial gas does not exclude natural gas, 455, 742
- Federal question, when raises, 451
- Forfeiture of exclusive franchise, 452, 454
 - Gas works building under void grant or franchise, 457
- Injunction against passage of ordinance, 453
- Legislature cannot revoke, 447
 - cannot authorize, 449
 - may authorize, 441, 442, 443
- Statute to authorize exclusive grant necessary, 444, 449
- Streets, *see*
- Void, when clause does not make, 452

MORTGAGE —

- Accounting by mortgagee for profits received, 346, 347
- Fixtures may take, 571, 577
- Leasehold interest may be mortgaged by lessee, 341
- May work a forfeiture of lease, 174
- Miner may mortgage premises, 341
- Mortgagee in possession, 346, 347
- Municipal gas plant may be mortgaged, 348
- Owner of land may take out gas and oil from mortgaged lands, 344, 345
- Pennsylvania statutes concerning, 343
- Verbal agreement for, 342
- Waste, 344, 345
 - committed by mortgagee, 346, 347

MUNICIPALITY —

- Action against to recover cost of gas, 432
- Appropriation for light, when necessary, 427
- Assessing abutting property for gas or light, 430
- Assignment of lighting contract, 414
- Bids for lighting, 411

(References are to sections.)

MUNICIPALITY—Continued.

- Breach of lighting contract, 413
- Charter granted by is a contract, 391
- City agreeing not to compete with gas company, 448
- Competing with gas company, agreements to not do so, 448
- Competition with private plant, 516
- Contract, *see*
 - for light cannot be changed, 417
- Delegating of power to change gas rates, cannot make, 404
- Discontinuing use of gas, 416
- Election to authorize purchase or erection of gas plant, 517
- Exempting gas company from taxation, 425
- Extending boundaries after contract made for gas, 419
- Extending term of contract for light, 410
- Free light, 424
- Gas furnished without contract, 418
- Gas mains, extending, 437
- Gas works, its own may lease, 522
 - owning, 511, 512, 513
 - purchasing, 519
 - selling its own, 521
 - sole proprietor must be, 518
 - statute necessary to build, when, 512, 513, 514
- How executes contract for light, 412
- Indebtedness, constitutional limit upon, 408, 409
- Interest, pays on over-due bills, 433
- Lamps, what kind must use under contract, 434
- Lamp posts, 434
- Length of term for lighting contract, 409
- Liability in operating gas plant, 628
- Light, *see*
 - exhaustion of appropriation, 428
 - moonlight schedule, 422
 - quality of gas or light furnished, 436
 - out of what fund paid for, 426
 - tax to pay for, 429
- Mandamus, *see*
- Mandate to compel auditing of bills, 431
- Monopoly, *see*
- Moonlight schedule, 422
- Oil turning into sewer, liability, 668
- Police power cannot abrogate, 391
- Power to make lighting contract, 407
 - to change rates for gas, 400
- Price must pay for light, 423, 424, 425
- Profit may make on gas furnished, 515
- Rates for gas, *see*
 - fixing in ordinance granting franchise, 394
 - in annexed territory, 405
 - regulating after ordinance granted, 393
 - statutory authority necessary to fix, 392
- Received bond to furnish light under contract, 438
- Rescission of lighting contract, 413, 415
- Regulating gas company, 99
- Rules and regulations may adopt for gas consumers, 523
- Shutting off gas, when may, 547
- Stock may take in gas plant, 518
- Streets, *see*
- Tax to pay for or support gas plant, 429

(References are to sections.)

MUNICIPALITY—Continued.

- Town becoming city, effect on gas company, 486
- Trustee for gas works, 520
- Void contract, gas furnished under, effect, 420, 421

MURRYSVILLE—

- Gas wells, 9

N**NAPHTHA—**

- A dangerous agency, 374, 375
- Sale for illuminating oil, liability, 678

NATURAL GAS—

- Article of commerce, 40, 350
- Artificial gas, contract concerning does not relate to natural gas, 455, 742
- Damages for unlawfully taking from well, 33
- Dangerous, is, 382
- Early indications in America, 9
- Elements in composition, 12
- Failure of supply, 531
 - right of gas company to discriminate between customers, 526
- Flambeau lights, use of may be prohibited, 386
- Fugitive nature, 21, 24, 25
- Gas, *see*
- Gas wells not synonymous with oil wells, 118, 119
- Heat, natural gas is not, 39
- Highways, ownership of gas beneath, 306
- Illegal severance from earth, 27
- Injunction to prevent waste, 598
- Judicial notice of nature of, 41
- Lake, title to gas beneath, 306
- Larceny, 26
- Not synonymous with oil, 37, 455, 742
- Origin, 10
- Ownership in ground, 20, 21, 22, 24, 25
 - in pipes and tanks, 26
- Payment so much per well, 223
- Paying quantities, what is considered to be, 136
- Pressure in pipes, regulating, 383
- Presumption as to ownership in land, 59, 60
- Prohibiting transportation beyond state lines, 29, 384
- Production will not prevent forfeiture of oil lease, 164
- Pumping, regulating, 29, 394
- Realty, a part of, 19
- Reservation of minerals includes, 304
- River, ownership of gas beneath, 306
- Sale and not a lease of gas lands, 58
- Sea, ownership of gas beneath, 306
- Severance from realty, 26
- Tariff, not subject to, 44
- Title to, lessee, when acquired, 34
 - when vests in owner of ground, 22
- Transportation, 350 to 354
- Volatile substance, when is not, 38
- Waste, injunction to prevent, 28, 385, 386
 - may be a nuisance, 598
 - prohibiting, 28, 385, 386
- When found, 8, 9

(References are to sections.)

NATURAL GAS — Continued.

- Who entitled to under oil lease, 119
- Wild animals, compared with as to ownership, 21

NECESSARY OF LIFE —

- Artificial gas is not, 748

NEGLIGENCE —

- Benzine used in paint exploding, 675
- Care required, 671
- Carriers of oil, negligence of, 351
- Child, negligence of its parents defeating cause of action, 653
- Company misleading plaintiff as to extent of danger, 627
- Concurring negligence of two or more defendants, 605
- Contractor occasioning injury, gas company liable, 605, 681
- Contributory negligence a question for the jury, 652
 - of tenant may bar landlord's right of action, 654
- Danger from exploding oil, 375
- Defective cars used in carrying oil, 371, 372
- Degree of care required of gas company, 601
- Duty of company to make immediate repairs, 616
- Exploding gasoline fire-pot, 669
 - tank injuring servant, 684
- False brands misleading dealer, 670
- Fire communicating with adjoining house, 671, 672
- Fire on railroad communicating with refinery, 665
- Gas-box occasioning injury, 680
- Illegally storing oil at railroad stations, 379
- Imperfectly constructed gas building occasioning injury, 683
- Implied warranty in sale of illuminating oil, 679
 - inspection of pipes to detect leaks, 615
 - right of company to inspect premises, 615
 - of pipe-line, 378
- Intervening agency, 614
- Jury, when question of negligence submitted to them, 663
- Leaks and explosions, *see*
- Minor employee's oil-soaked clothes catching fire, 674
- Oil escaping from pipe-line, 377
 - from refinery, 672
 - into sewer, 668
- Pipes used without knowledge of defects in them, 747
- Question of negligence, when for jury, 663
- Refinery burned by railroad company, 665
- Repairs, duty of gas company to make, immediately, 616
- Rescuer injured by negligence of oil or gas company, 673
- Reversions, when may recover damages caused by an explosion, 654
- Right of action over against wrongdoer, 656
- Sale of naphtha for illuminating oil, 678
- Servant of company injured by defective appliances, 676
 - entitled to safe place in which to work, 685
 - defective ladder injuring, 686
 - of purchaser injured by exploding oil, 677
- Shipping oil on trains carrying other goods, 373
- Shooting wells, 667
- Statute changing rule as to rendering company liable, 606
- Stop-cock, failure to provide, 666
- Storing oil in warehouse, 380
- Streets, *see*
 - rendered dangerous by laying gas mains, 682
- Thief setting oil on fire, 381

(References are to sections.)

- NEW YORK** —
 Fredonia gas well, 9
 Oil spring within discovered at an early date, 3
- NEW ZEALAND** —
 Oil wells, 7
- NINEVEH** —
 Asphalt used in cementing walls, 1
- NITROGLYCERIN** —
 Exploding in oil or gas well, 31
- NOISOME SMELLS** —
 When a nuisance, 586, 587, 588
- NOTICE** —
 Change of gas rates by city, 400
 Election to declare forfeiture of lease, 158
 Evidence of other leaks, to show, 621, 622
 to company of danger to mains, 620, 622
 Improperly recorded, 88
 Leaks (of), duty to prevent, 615 to 619.
 Prior lease, 69, 88
 Property owner's duty to notify gas company of leaks, 626
 To one of several joint lessees sufficient, 87
 Withdrawing gas from mains without giving notice, 630
- NUISANCE** —
 Blocking highway or street, 465
 Business being authorized by State is no defense, 591
 Damages occasioned by storing or bringing oil on land, 584
 Degree of annoyance from escaping gas, question for jury, 589
 Duty of owner to prevent continuation of damages, 592
 Evidence concerning, 593
 Former recovery, when a bar, 596
 Gas-box in street is not, 498
 Gas or oil well near dwelling house, 590
 Indictment, concerning, 597
 Injunction to prevent, 594, 595
 Jury when to determine question of, 589
 Noisome smells, 586, 587, 588
 Obstructing street, 494
 Pollution of springs or well, 581, 582, 607
 Stream polluting, 582
 Subterranean waters, polluting, 583
 Trees and vegetation destroying, 585
 Well polluted with gas, and yet good for some purposes, 607
- O
- ODORS** —
 When a nuisance, 586, 587, 588
- OHIO** —
 Early gas wells, 9
 Early oil springs, 2, 4
- OIL** —
 Contract for purchase, 745
 Deception used to secure sale of dangerous oil, 678
 Implied warranty in sale of illuminating oil, 678
 Inspection of, State may require, 388
 Leaks and explosions, *see*
 Negligence, *see*
 Not synonymous in statute with gas, 37

(References are to sections.)

OIL — Continued.

- Ordinance may regulate storage, 389
- Petroleum, *see*
- Sale of oil of low fire test, explosion, 677, 678
- Taxing, 741
- Term "fire proof oil" is not a trade mark, 746
- United States may not prohibit sale of, 390

OIL REFINERY —

- Negligence, *see*
- Subject to mechanic's lien, 340

OLD TESTAMENT —

- Contains reference to petroleum, 1

OPERATIONS ON LEASED PREMISES —

- Celerity with which must be pushed, 96
- Cessure after work begun, 140, 141
- Diligence in operating leased premises after development, 97
- Failure to operate and not failure to develop, 162, 163
- Inability to begin operations, 173
- Obligation of lessee to operate premises implied, 151
- Temporary suspension of, effect, 141
- When must be begun, 96

OPTION —

- City to purchase gas works, 458

OPTION FOR LEASE —

- Assignment of lease carries, 198
- Consideration for, 66, 67, 71
- Essence of, 72
- Extension of lease, 68
- Leases, *see*
- Payment of rent instead of developing premises, 145
- Purchase of land after development, 67
- Right to pay rent or drill well, 73
- Revocation, 71, 72
- Time for performance, 73
- What is an option, 62
- When must be general in the regulation of street, 460

ORAL AGREEMENTS —

- Statute of Frauds invalidates, 75, 76
- Written lease may be changed by, 83

ORDINANCES —

- Enjoining passage of by city council, 453
- Rates for gas fixed by 392, 393, 394

ORTON, PROFESSOR —

- Theory of origin of petroleum and gas, 10

OVERCHARGE —

- Recovering back, 544

OWNERSHIP —

- Oil and natural gas in earth, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

P**PAINT SHOP —**

- Using benzine in for painting purposes, insurance, 675

PAROL AGREEMENTS —

- Statute of Frauds avoids parol leases, 75, 76

PARSEES —

- Worshiped natural gas, 8

(References are to sections.)

PARTITION —

- May be made of mineral lands, 276, 277
- When does not lie, 36
- Works a dissolution of mining partnership, 320

PARTNER —

- Community of interest, 312, 315
- Confidential relations, 312
- Co-tenants, *see*
- Each partner liable for all partnership debts, 325
- Incoming partner liable for debts, 324
- Lien upon partnership assets, 323
- Promoters and prospectors are not partners, 318
- Selection, who makes, 315
- Tenants in common are not partners, 311, 316

PARTNERSHIP (MINING) —

- Association of several lessees in mining enterprise, legal effect, 316
- Borrowing money, power of partner to do so, 322
- Buying supplies for, who may, 322
- Debts of, partner liable for all partnership debts, 325
 - liability of incoming partner for, 324
- Dissolution revokes license, 64
 - what occasions, 319
- Duration of mining partnership, 319
- Fidelity relations between partners, 288
- Heir's right in mining property, 315
- Hiring labor, power of partner to do so, 322
- Illustrations of what make mining partnerships, 317
- Lien of individual partners, 322
- Limited partnerships, 326
- Majority of partners control mining operations, 321
- Mining agreements that create ordinary partnerships, 313
 - applicable to gas and oil operations, 310
 - associations may become an ordinary partnership, 312
- Partition and accounting works dissolution of partnership, 320
- Partners, selection, 315
- Power of partners in mining or oil enterprises, 322
- Presumption of equality of interest of partner, 319
- Sale of interest, effect on partnership, 315
- Tenants in common not partners, 311
- Working mine together creates mining partnership, 314

PASSENGERS —

- On train injured by exploding oil, 375

PAYMENTS —

- Application, 136

PAYING QUANTITIES —

- Defined, 134, 135, 136

PENNSYLVANIA —

- Early gas wells, 9
- Mortgaging lease, statute concerning, 343
- Taxing pipe lines and petroleum, 740

PERSIA —

- Oil wells, 7

PETROLEUM —

- Article of commerce, 40, 350
- Composition, 11
- Damages for unlawfully taking from well, 33
- Dangerous agency is not, 372, 374

(References are to sections.)

PETROLEUM — Continued.

- Defective barrels used in shipping, liability, 374
- Early attempts at refining, 12
 - at transportation, 15
- Escaping from pipe lines, liability, 377.
- Fugitive nature, 21, 24, 25
- Highway, ownership of beneath, 306
- Illegally severing from earth, 27
 - storing at railroad station, 379
- Ingredients, 11
- Judicial notice of properties, 41
- Lake, oil beneath, ownership, 306
- Larceny of when in pipe lines, 46
 - generally, 26
- Mineral, oil is, 18
- Origin, 10
- Ownership in ground, 20, 21, 22, 24, 25
 - in pipes and tanks, 26
 - in pipe lines, 355
- Presumption of ownership in land, 59, 60
- Production of will not prevent forfeiture of gas lease, 164
- Pumping, 30
- Sale of oil lands and not a lease, 58
- Shipping on train carrying other goods, 373
- Storing in warehouse, negligence, 380
- Realty is a part of, 18
- Reservation of minerals include, 304
- River, beneath, ownership, 306
- Sea, beneath, ownership, 306
- Severance from realty, effect, 26
- Thief setting oil on fire, negligence, 381
- Title to oil in tanks or pipe lines, 46
 - when vests in owner, 22
 - when lessees acquire, 34
- Transportation with defective appliances, 371, 372
- Use of as a medicine, 14
- Waste of gas, when drawing oil from well, 385
- Wild animals compared with wandering nature of, 21

PHILLIP'S WELL —

- Where drilled, 6

PIPES —

- Abutting land owner removing pipes from highway, 508
- Breaks occasioned by frost, 624
 - by ordinary use of street, 623
 - from lack of support, liability of gas company, 625
- Changing grade of streets, 493
- Condemnation of highway for pipes, 503
- Consent of county authorities to lay in highway, 506
- Crossing highway, 506
- Defective, will not always render company liable for leaks, 747
- Depth at which should be laid in streets, 480
- Evidence of undue pressure in places other than place of leak, 632
- Excavations near pipe line causing break, liability of gas company, 625
- Extension of mains to supply customers with gas, 528, 529
- Fixtures, when are, 571, 572, 573
- Gas mains, *see*
- Injunction to restrain laying in streets, 487
- Injuries occasioned by laying gas pipes in streets, 682

(References are to sections.)

PIPES — Continued.

- in repairing streets, 496
- Inspection of pipes required, 615
- In streets, not an additional burden on fee, 500
- Laying in country highway, 502 to 506
 - in navigable river, 501
 - in streets, consent of city required, 466, 468
- Notice to gas company of danger to its mains, 620
 - of leaks in pipes, 620, 621, 622
- Personal property of gas company, 579
- Removal, when unlawfully laid in highway, 509
- Revocation of license to use highway, 507
- Street unlawfully laid out, pipes laid in, 488
- Support of, 497, 368
- Supply pipe, ownership, 550
- Taxed as personal property, 730
- Undue pressure of gas causing leaks, 631
- Use of surface of highway or street, 510

PIPE-LINES —

- Coal mine beneath, support, 368, 497
- Conversion of oil in, 46
- Crossing right of way of railroad company, 365
- Damages occasioned by removal from right of way, 364
- Early attempts at use of, 15
- Eminent domain used to secure right of way for, 356, 357, 358
- Exemption from taxation in Pennsylvania, 740
- Inspecting, 378
- Laying in country highway, 360
- License to lay pipe-lines, revocation, 366
- Measure of damages in taking right of way for, 361 to 364
- Number that can be laid in right of way, 259
- Oil escaping from, 377
- Ownership of oil in process of transportation, 355
- Personal property of gas company, 579
- Petition to secure right of way for, 367
- Pressure in of gas may be regulated, 383
- Removal, 579
- Support, right to, 368
- Use in transportation of gas and oil, 350 to 354

PLINY —

- Refers to oil springs, 1

PLUMBER —

- Causing explosion, liability of gas company, 638
- Gas mains, *see*

POLICE POWER —

- Abandonment in fixing rates for gas, 398
- Granting a charter does not repeal police power, 391
- Inherent power to regulate gas company, 399, 406
- Legislature may exercise, 382
- Rates, fixing, does not authorize, 406
- Regulation of transportation of oil or gas, 355

POSSESSION —

- Effect of taking under contract for lease, 292

PREMISES —

- Defined in insurance cases, 639

PRESUMPTIONS —

- Arising from proof of explosions, 611, 612
- Ownership of oil or gas in land, 69, 60

(References are to sections.)

- PRIVITY OF ESTATE**—
 Possession of assignee, 203
- PROFITS**—
 Defined, 224
- PROMOTERS**—
 Are not partners, 318
- PROSPECTORS**—
 Are not partners, 318
- PUBLIC LANDS**—
 Locations and entry of oil and gas claims, 309
- PUMPS**—
 Use of to increase flow of gas or oil, 29, 30
- Q**
- QUIETING TITLE**—
 Title of lessee when may be, 103
- QUO WARRANTO**—
 Action, *see*
 Forfeiture of right declared by to occupy streets, 491
- R**
- RAILROAD**—
 Common carriers, *see*
 Crossing right of way with pipe-line, 365
 Negligence, *see*
- RATES FOR GAS**—
 Acceptance of provisions of subsequent ordinance that changes rates for gas, 396
 Action to recover price of gas, 545
 Annexing territory, rate for such territory, 405
 City regulating rate after franchise granted, 393
 City must have statutory authority to fix rates, 392
 Classification of customers, 543
 Collection of, how made, 545
 by distress, 546
 Consumer, *see*
 Delegation of power to determine, cannot be done, 404
 Extra charge for meters and mixers, 561
 Fixed by city in its consent to assignment of franchise, 395
 in ordinance granting franchise, 394
 Government tax may be added to price of gas, 561
 Notice by city of intention to change rates, 400
 Overcharges, can be recovered back, 544
 Police powers not abrogated in fixing rates, 406
 cannot be abandoned, 398
 Power to change, 400
 Prices to be charged to customers, 539, 542
 in other states fixing, 539, 542
 Prohibition to change for specified time, 397
 Reasonable, must be, when changed by city or state, 401 to 403
 Requiring certain quantity per month to be used, 562
 Taxes are not rates, 734
 When may be changed by city or state, 401, 402, 403
- REAL ESTATE**—
 Contract for oil may give an interest in land, 52
 Lease, *see*
 No interest in land vests if no oil or gas discovered, 53
 Oil and gas a part of land, 19
 Refinery burning, 665

(References are to sections.)

- RECEIVER —**
 Liable for royalty on oil he takes out, 253
 Light, when must furnish, 438
 Lighting contract, when may rescind, 414, 415
 Tenants in common of oil (for), 316
 Title to oil lands in dispute, 300
 When will be appointed to operate gas wells, 300
- RE-ENTRY —**
 Release of premises equivalent to, 167
 When necessary to enforce forfeiture, 166
- REFINERIES —**
 Burned by negligent act of railroad company, 665
 Early refineries, 13
 Permitting oil to escape from into harbor, 672
- REFINING —**
 Early attempts at refining petroleum, 13
- REGULATIONS —**
 Power of legislation to regulate use of oil and natural gas, 25
 Rules, *see*
- REIMBURSEMENT —**
 Insurance, *see*
 When an operator entitled to, 121
- RELEASE —**
 Equivalent to a re-entry, 167
- REMAINDERMAN —**
 May not drill wells, 267
 When estopped, 272
- RENT —**
 Abandoning lease, falling due thereafter, 137
 Co-tenant may receive, 287
 Defined, 221, 222
 Eviction releases lessee for rent, 241
 Failure of oil, rent ceases, 248
 Free gas, 225, 226
 Instances of lessee's liability, 250
 Inter-dependent conditions, 235
 Joint lessors, 230
 Lessee must pay, 180
 cannot avoid by taking advantage of forfeiture, 155, 238, 239
 Mining rents defined, 221
 New lease effect upon, 236
 Option to pay rent or drill well, 73
 Oral change of terms of lease, 247
 Payment of rent if well is not drilled, 242
 instead of developing premises, 145
 must be made although no oil on premises, 179
 will not prevent forfeiture for neglect to develop, 178
 Royalties, *see*
 is a rent, 221
 Surrender necessary to evade liability for, 240
 To whom payable, 230
 Various kinds, 220
 Waiver of right to exact, 233
 When due for failure to develop land, 229

(References are to sections.)

RESERVATION —

- Distinction between and an exception, 302
- Exception, *see*
- Of all minerals includes gas and oil, 304
- Restriction of right to drill for oil, 305
- Severance of mineral by use of, 303
- Subject to lien of judgment, 307
- What, is of gas and oil, 35
- Wife's interest in, 308

REVERSIONER —

- May drill wells, 267
- When may recover damages caused by an explosion, 654

RIVER —

- Laying gas pipes in, 501, 603
- Oil beneath, 306

ROYALTIES —

- Abandonment, royalties falling due after, 137
- Account rendered, 251
- Assigned, may be, 202
- Co-tenant may receive, 287
- Damages for failure to deliver to lessor his share, 231
- Defined, 221, 222
- Failure to pay, effect, 177
 - of oil, rent ceases, 248
- Gas or oil used to operate leased premises, 227
- How collected, 252
- Income defined, 224, 225
- Instances of lessee's liability, 250
- Inter-dependent conditions, 235
- Interest on, when begins to run, 232
- Joint lessors, 230
- Lessee can avoid by taking advantage of forfeited clause, 238, 239
- Lien, occurring during receivership, 253
- Minimum production allowed, 243
- New lease, effect upon, 236
- Option to pay or drill well, 73
- Oral change of terms of lease, 247
- Payment, so much per well, 223
- Percentage of profit or income, 224
- Purchase money for premises, when is, 244
- To whom payable, 230
- Various modes of fixing, 220
- Waiver of right to, 233
- When due, 228, 229

RULES —

- City may adopt for its customers, 523
- Consumer, *see*
- Gas company has a right to adopt for its customers, 537
- Meter regulations, 560
- Regulations, *see*
- Removal of meter, 564
- Subscribing to, 538

S**SALE —**

- Lease, *see*
- Municipal gas works may be sold by city, 521

(References are to sections.)

- SARDINIA** —
Oil found there, 1
- SCONCES** —
When are fixtures, 568
- SCOTLAND** —
Oil wells, 7
- SEA** —
Ownership of oil beneath, 306
- SENECA** —
Oil describes, 3
- SERVANT** —
Exploding tank injuring, 684
Injured by use of defective ladder, 686
Injured by defective appliances, 676
Purchaser injured by exploding oil, 677
Safe place in which to work is entitled to, 685
When may recover for injury, 666
- SEWERS** —
Gas driven from sewer into house by escaping illuminating gas, 636
Gas escaping into sewer from pipes and entering house, 629
Oil escaping into sewers and causing fire, 668
- SHADE TREES** —
Escaping gas injuring, 635
- SHUTTING OFF GAS** —
Meaning of when used in contract, 744
- SHRUBBERY** —
Escaping gas injuring, 635
- SICKNESS** —
Occasioned by failure to supply gas, liability, 534
- SIDEWALK** —
Occupying with gas pipes, 474
- SILLIMAN, JR., BENJAMIN** —
Description of oil springs, 3
- SMOKE** —
When a nuisance, 586
- SOUTH AMERICA** —
Oil wells, 7
- SPECIFIC PERFORMANCE** —
To enforce contract for lease, 293
- SPRING IS** —
An oil spring, 1
- SPRINGS** —
Pollution, 581
- STATE** —
Waste of natural gas may prevent, 598
- STATUTE OF FRAUDS** —
Assignment of contract, 94
Contract for lease, sufficiency, 291
Decisions concerning, 75
- STATUTE OF LIMITATIONS** —
Acquiring right to oil or gas by adverse possession, 299
No bar to an accounting, 301

(References are to sections.)

STOP COCK —

- Neglect in not providing, liability of gas company, 665
- On street, who may open, 613

STOVES —

- When gas stoves are fixtures, 568

STREAMS —

- Pollution by gas works, 582
- Subterranean, polluting, 583

STREETS —

- Change of grade, effect on pipes, 493
- Change of use of franchise, 478
- Conditions of grant to use street must be performed, 472
- Consent of municipality to occupy streets is necessary, 466
 - when not necessary, 468
- Consolidation of gas companies occupying streets, 485
- Control, 464
- Cutting into improved pavements, 495
- Defined, 463
- Forfeiture of right to occupy, 490, 491
 - waiver, 492
- Franchise, *see*
 - acceptance of grant, 471
 - to occupy, disused, 469, 470
- Gas boxes in street, 493
- Gas posts in street, 499
- Grant of right to occupy street strictly construed, 473
 - before company organized, 482
- Highway, *see*
- Indictment for obstructing, 495
- Injunction, *see*
 - to restrain laying pipes, 487
 - to protect company's rights, 481
- Injury to pipes in repairing streets, 496
 - to persons occasioned by laying gas mains therein, 682
- Length of time of grant to occupy, 483
- License to occupy, 489
- Monopoly, *see*
- Natural gas company may not use for artificial gas, 478
- New, right to occupy, 475, 476
- Obstructing with pipes, 494
- Ordinance granting right to occupy when void, effect, 479
- Ordinance to occupy with gas mains, 460
- Permission to occupy streets, 495
- Pipes, *see*
 - laying in streets, 466, 468
 - not an additional burden, 500
- Regulation of right of gas company to occupy, effect, 480
- Repairing, 495
- Revocation of grant to occupy, 489
- Right to grant a franchise not property of city, 467
- Sale or assignment of right to occupy, 477
- Sidewalk a part of, 474
- Specification of in grants, 474, 476
- Statute necessary to authorize city to give an exclusive grant, 444, 445
- Support of gas mains, 497
- Surface of cannot be used for pipes, 510
- Tearing up, 494, 495
- Termination of life of corporation before expiration of franchise, 484

(References are to sections.)

- STREETS** — Continued.
Territory annexed to another city after grant made, 475
Town becoming a city, effect on gas company, 486
Unlawfully laid out, effect on gas company occupying with its mains,
488
Use for private purpose cannot be made, 465
What streets gas company may occupy, 474, 476
- SUB-LEASE** —
Assignee of lease, *see*
Assignment of lease is not a sub-lease, 197
Defined, 217
- SUB-LESSEE** —
Assignee of lease, *see*
Liability of sub-lessee, 217
- SUBTERRANEAN WATERS** —
Polluting, 583
- SUIT** —
Action, *see*
Cancellation of part of lease, 186
Forfeiture, *see*
Lease, *see*
- SUMATRA** —
Oil wells, 7
- SUPPORT** —
Right to have for pipe line, 368
- SURETY** —
When assignor of lease is liable on account of lease, 216
- SURFACE** —
Oil must be brought to surface to comply with terms of lease, 176
Owner of mineral not co-tenant with owner of surface, 280
Right of lessee to use, 77
- SURRENDER** —
After assignment, 168
Co-tenant may make or receive, 284, 286
Involves yielding up the lease or premises, 142
Necessary to evade liability for rent or royalty, 154, 240
Parol, by, may be, 144
Substitution of tenants or assignment of lease, 143
When necessary, 142, 144, 234
- SYNONYMOUS** —
Gas is not with oil, 164
Natural gas grant has no application to artificial gas grant, 455
Oil lease not with gas lease, 37, 118, 119
Statute relating to artificial gas has no application to natural gas, 742,
478

T

- TABLES** —
Composition of petroleum, 11
of gas, 12
- TANKS** —
Assignment of lease does not carry oil in, 254
Exploding tank injuring servant, 684
- TANK CARS** —
Use of defective cars in transporting oil, 371
Use of in transporting oil, 351

(References are to sections.)

TARIFF —

Natural gas not subject to laws of, 44

TAXES —

Adding to price charged for gas, 561, 737

Exemption from taxation, 728, 740

from in fixing price for gas, 425

of municipalities from taxation, 733

of property of manufacturing company, 729

Franchise, owning, 735

Gas mains of city plant taxed as personal property, 730

Inter-state commerce law does not prohibit, 739

Leases and minerals, 741

Lessees when must pay, 741

Meters, 556

Object of tax, when must be stated in statute, 736

Oil in pipe-line, 739

Rates for gas charged consumers are not taxes, 734

Tax to pay for gas or to support gas plant, 429

Stock and valuation, 732

when exempt from taxes, 728

Surplus, certificate of, taxing, 732

United States revenue adding to cost of gas, 737

TENANCY —

At will, 55

From year to year, 55

TENANT —

Contributory negligence of may bar landlord's right of action, 654

Co-tenant cannot bind his fellow tenant, 62

Fixtures, right to, 573, 574

Insurance policy, violating its provisions, 696

Joint lease by separate land owners, 86

Landlord and tenant, *see*

Right of action against landlord, 646

Shutting off supply of gas because old bills not paid, 547

Subsequent tenant not liable for former tenant's gas bill, 547

Supplying with gas, gas company must, 526

When relation of landlord and tenant creates, 57

TENANTS IN COMMON —

Are not partners, 311, 316

Co-tenant, *see*

cannot bind his fellow tenant, 62

Liability of assignee of part interest in lease, 207

Payment of rent or royalty to one tenant, 230

Two tracts of land drained by one well, 246

TENANTS FOR LIFE —

May work open mine, 259

Oil wells already open may work, 261, 262

When may open new mines, 260

may take out oil or gas, 35

TAXATION —

Cost of inspecting meters, 735

Exemption from taxation, 740, 729

of municipality from, 733

Franchise, 731

Gas mains, 730

Interstate commerce, 739

Leases, 741

(References are to sections.)

TAXATION — Continued.

- Object of tax, stating in statute, 736
- Product in pipe-lines, 739
- Rates charged consumers are not taxes, 734
- Stock, valuing, 732
- Set-off, 738
- Surplus, 732

TAXES —

- Consideration of gas contracts, 56

THIEF —

- Setting oil or gas on fire, 381

TITLE —

- Interest of lessee in various leases, 57
- Failure of, reimbursement of oil operator, 121
- Life tenant severing oil from premises, 269, 270
- Non-productive well, effect, 139
- Oil in tanks or pipe-lines, 46
- Owner of land has to oil or gas, 24, 25, 26, 27
- Severance of oil or gas from land, effect, 26
- When title to oil or gas vests in lessee, 53, 54

TRADE MARK —

- The term fire proof oil is not, 746

TRANSPORTATION OF OIL OR GAS —

- Carrying gas beyond state boundaries, 352
- Defective cars causing fire, 605
- Early history of pipe-lines, 15
- Injury occasioned by reason of defective cars or track, 371 to 376
- Inter-state commerce, 350 to 353, 384
- Limiting that of oil or gas, 40
- Of oil or gas a public use, 350
- Prohibiting transportation of natural gas beyond state lines, 384

TREES —

- Destroyed by gas, 585, 662
- Shade trees, *see*

TROVER —

- Lies to recover oil, 27

TRUSTEE —

- To operate city's gas works, 520

TRUSTS —

- Unlawful combinations, *see*

U

UNLAWFUL COMBINATIONS —

- Between gas companies, 459

UNITED STATES —

- Early indications of natural gas, 9
- May not prohibit the sale of naphtha, 390
- Oil wells in, 7
- Refining petroleum in, 13
- Revenue tax added to cost of gas, 435
- Taxing gas plants and gas, 737
- Tariff, *see*

V

VEGETATION —

- Destroyed by leaking gas, 585
- Proof of effect of gas upon, 662

(References are to sections.)

- VENDEE** —
 Fixtures on coal or mineral lands, 575, 577
 When entitled to fixtures, 570
- VICINITY** —
 Defined in contract to drill wells, 125
- "VOID"** —
 When means voidable, 151
- VOLATILE SUBSTANCE** —
 Whether gas is or not, 38
- W**
- WAIVER** —
 Insurance, *see*
 Of forfeiture, 159, 160
 Of right to rent or royalty, 233
 Quality of gas or light may be waived, 436
- WALLACHIA** —
 Oil wells, 1, 7
- WARRANTY** —
 Implied warranty in sale of illuminating oil, 679
 In policy of insurance, 700
- WASTE** —
 Guardian guilty of, may be, 35
 Injunction to prevent, 35
 Lessees as between, 35
 Life tenant must account for, 268
 Mortgagee committing, 346, 347
 Mortgagor may take out gas and oil from land, 344
 Natural gas may be a nuisance, 698
 Tenant for life taking out oil or gas, 35
 Wells near boundary lines are not, 35
- WATCHMAN** —
 Gas company must maintain to detect leaks, 603
 Inspectors, *see*
 Leaks and explosions, *see*
 Night watchman to detect increasing pressure of natural gas, 603
- WAYS** —
 Streets, *see*
- WELLS** —
 Agreement concerning locating near boundary lines of lease, 102
 Boundary line upon, to protect territory, 91
 Coal mine, passing through, 309
 Contract to drill in the vicinity, 125
 Damages for failure to drill, 104
 Depth, 115
 Diameter, 124
 Draining premises by wells on adjoining territory, 101, 102, 171, 172
 adjoining territory, 101, 102
 Excuse for not drilling, 112, 113, 114
 Forfeiture, recovery of expense of not drilling, 137
 Gas to run drilling apparatus, 549
 Injury to property occasioned by shooting, 667
 Leases, *see*
 Lessor drilling on adjoining premises, 100
 Lien upon for supplies furnished, 333
 Life tenant, *see*
 right to drill well, 263, 265

(References are to sections.)

WELLS — Continued.

- Located on stranger's land, 116
- Locating, 109
- Maliciously drilling to another's damage, 32
- Non-productive, effect on title to leased premises, 139
- Nuisance, *see*
 - when may be, 59
- Number that must be drilled, 111, 112, 139
- Option, *see*
 - to drill or to pay rent, 73, 242
- One well draining two tracts of land, 246
- Payment of rent when wells not drilled, 73, 242
- Payment for natural gas so much per well, 223
- Plugging natural gas wells, 43
 - state may require, 385
- Pollution of water wells by gas works, 581
 - water still good for particular purposes no defense, 607
- Pumping, *see*
- Royalties, two tracts of land drained by one well, division, 246
- Selection for site for, who makes, 110
- Shooting, 117
- Test wells, *see*
 - well, when need not be drilled, 114
- Three months cessure of work upon, effect, 140
- Waste, *see*
 - of gas in operating oil wells, 385, 387
 - of gas prohibiting, 385, 387

WEST BLOOMFIELD —

- Gas wells, 9

WEST INDIA ISLANDS —

- Oil wells, 7

WEST VIRGINIA —

- Early oil springs, 2

WIDOW —

- When may drill wells on dower lands, 261

WILD ANIMALS —

- Ownership of oil and natural gas compared with ownership of wild animals, 21, 24, 25, 29

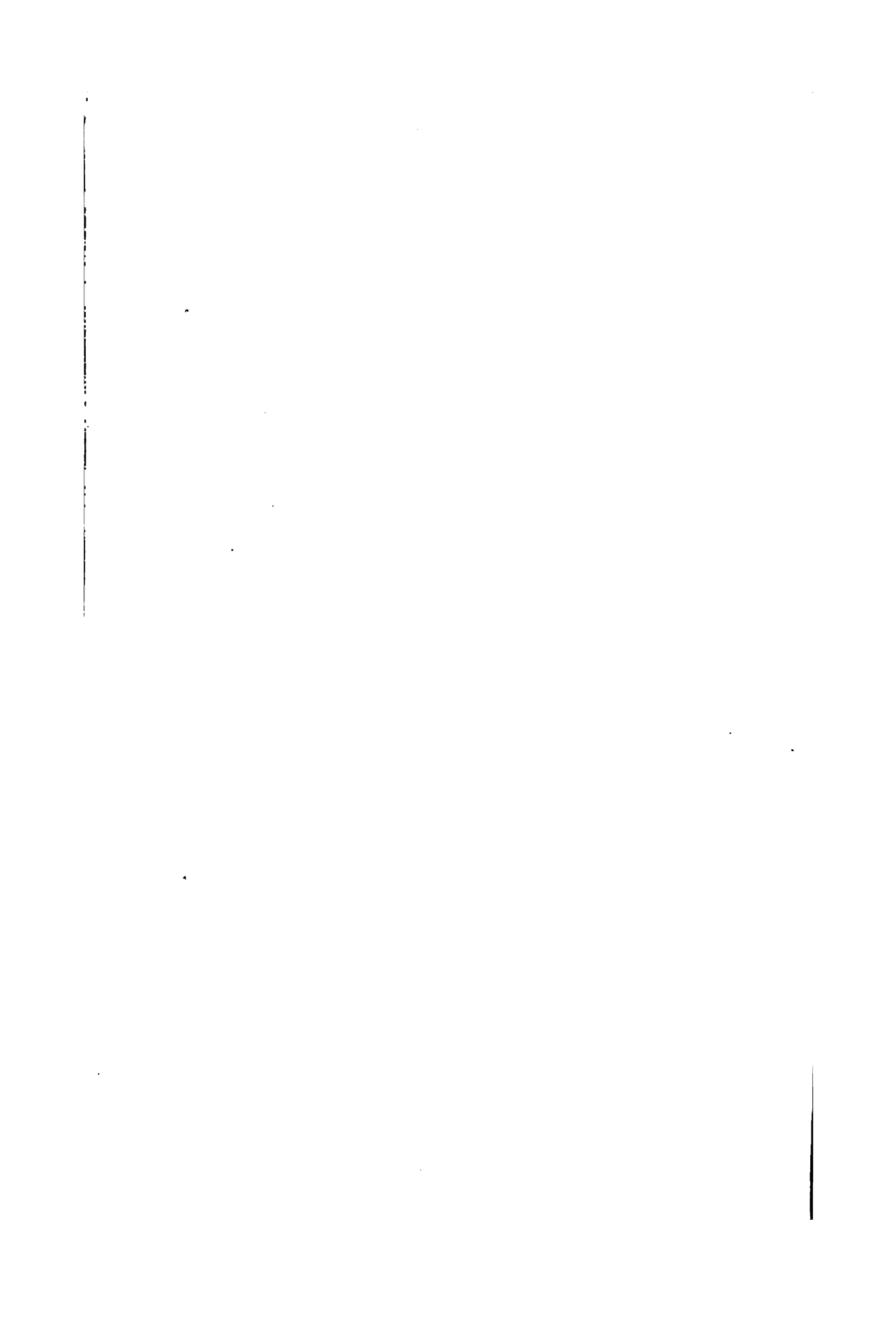
WORK —

- Celerity with which must be pushed, 96
- Inability to begin work, 173
- Operations, *see*
- When must be begun, 96
- When must be completed, 175

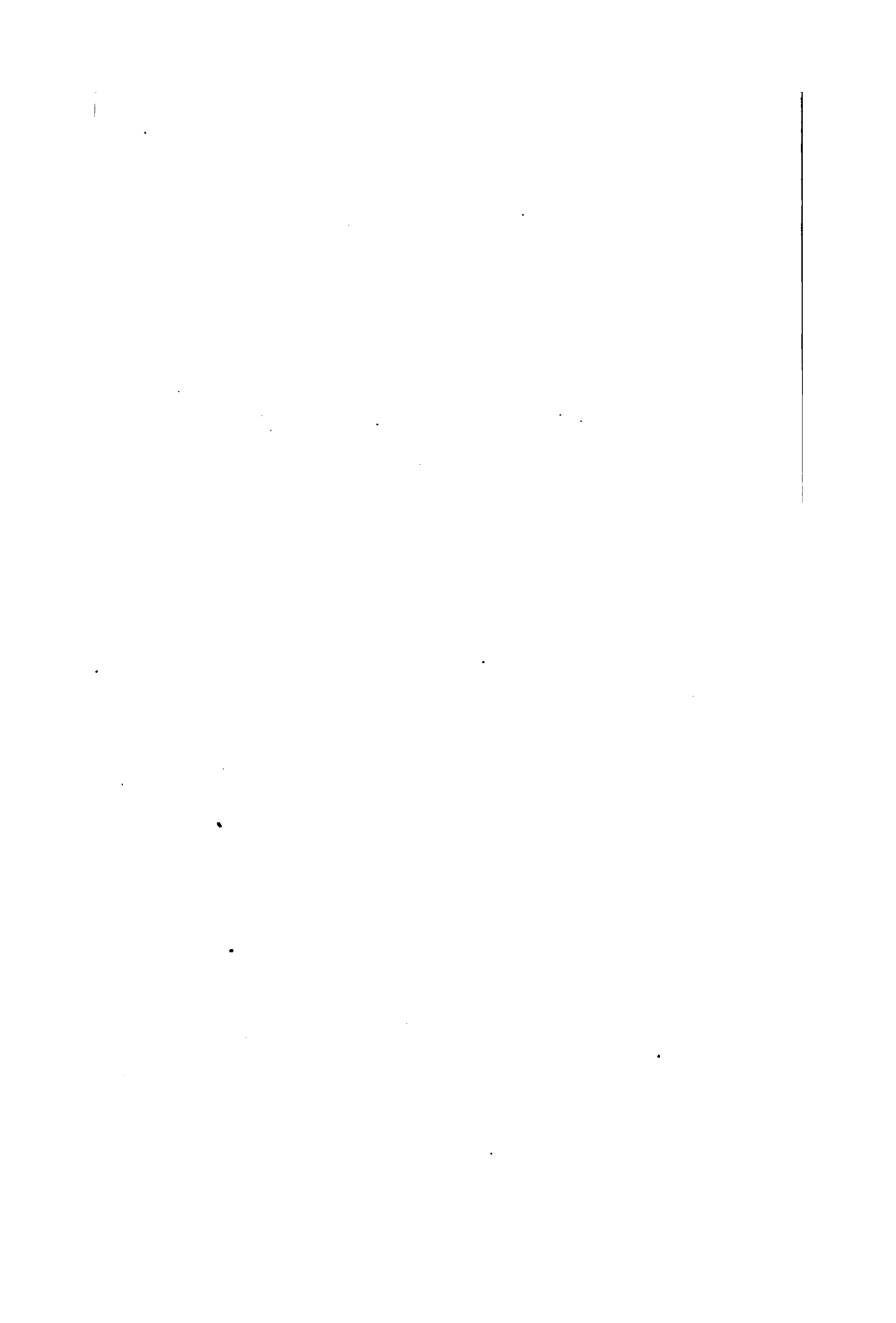
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ZANTE —

- Oil spring, 1









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